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In the
SUPREME COURT OF THE UNITED STATES
October Term, 1991

Gerald Cook, Warden of the Utah State Prison, ***Petitioner,***

v.

Ronald Watson Lafferty, ***Respondent.***

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the court of appeals so far depart from the accepted course of judicial proceedings when it erroneously concluded that the state court applied an incorrect legal standard in determining respondent's competency and conducted a de novo review of the state court's determination that this Court should review the court of appeals' action?

2. By judging the validity of respondent's religious beliefs, did the court of appeals decide this case in conflict with the applicable case law of this Court and the decision of the state supreme court?

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Petitioner Warden of the Utah State Prison petitions this Court for a writ of certiorari to review the published decision of a panel of the United States Court of Appeals for the Tenth Circuit, which reversed the conviction of respondent on the ground that the trial court erred in finding respondent competent to stand trial.

OPINION BELOW

The published opinion of the United States Court of Appeals for the Tenth Circuit is reported as *Lafferty v. Cook*, 949 F.2d 1546 (10th Cir. 1991), *reh. denied,* January 3, 1992. A copy of this opinion is reproduced as Appendix A to this petition.

JURISDICTION

Respondent Ronald Watson Lafferty was tried and convicted of, inter alia, two counts of first degree murder, both capital felonies. Lafferty was convicted of slitting the throat of his sister-in-law and helping his brother slit the throat of their fifteen-month-old niece. On direct appeal to the Utah Supreme Court, Lafferty argued that the trial court erred when it found him competent to stand trial. *State v. Lafferty*, 749 P.2d 1239 (Utah 1988), *on reconsideration*, 776 P.2d 631 (Utah 1989) (a copy of this decision is reproduced as Appendix B). The Utah Supreme Court affirmed the conviction and sentence, finding that Lafferty's right to due process had not been violated by the trial court's competency determination (Appendix B at 7b).

After Lafferty had exhausted his state remedies, he filed a petition for habeas corpus relief in the United States District Court for the District of Utah. When that court denied his petition, Lafferty appealed to the United States Court of Appeals for the Tenth Circuit. On December 9, 1991, that court, by a vote of 2-1, granted a writ of habeas corpus and vacated Lafferty's conviction and sentence on the ground that the state trial court had applied the wrong legal standard in finding Lafferty competent to stand trial. *Lafferty v. Cook*, 949 F.2d 1546 (10th Cir. 1991). A petition for rehearing and suggestion for *en banc* consideration was denied by an evenly split vote of the active judges of the circuit on January 3, 1992.

Petitioner now invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment to the United States Constitution provides, in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof[.]

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person shall be held to answer for a capital, or otherwise infamous crime, . . . nor be deprived of life, liberty, or property, without due process of law.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law[.]

28 U.S.C. § 2254. State custody; remedies in State courts reads, in pertinent part:

> (d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written

opinion, or other reliable and adequate written indicia, shall be presumed to be correct, . . .

> (8) . . . unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless . . . the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

Utah Code Ann. § 77-15-3 (1990) reads, in pertinent part:

> (1) Whenever a person who is charged with a public offense, or who is serving a sentence of imprisonment, is or becomes incompetent as defined in this chapter, a petition may be filed in the district court of

the county where the charge is pending or where the person is confined.

STATEMENT OF THE CASE

The factual background of this case is given in the opinions of both the federal circuit court of appeals (Appendix A) and the Utah Supreme Court (Appendix B). The evidence surrounding the criminal charges will not be recited here as the pertinent facts are those underlying the trial court's ruling on the competency of Lafferty to stand trial.

At arraignment on September 21, 1984, Lafferty[1] informed the court that he would represent himself. He asked the court if it was prepared to deal with religious matters. When the court said that it was a temporal court, Lafferty refused to enter a plea, stating that he did not want to give up his right to challenge the jurisdiction of the court. A not guilty plea was entered for Lafferty and an earlier appointment of standby counsel was continued (Hearing of Sep. 21, 1984).

On September 27, 1984, the prosecution filed a petition to determine Lafferty's competency under Utah Code Ann. § 77-15-3 (1990). At a hearing conducted the next day, Lafferty told the court that he would talk with the psychologists appointed to evaluate his mental condition. He did not promise to cooperate other than to talk with them until he knew what testing the psychologists intended to do (Hearing of Sep. 28, 1984).

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[1] One of Lafferty's brothers, Dan, was charged and arraigned in conjunction with Lafferty; however, Dan was tried separately and is not involved in this petition.

In letters filed October 10, 1984, two examiners opined that Lafferty suffered from a mental illness and was not competent to stand trial. The examiners declared that Lafferty was paranoid delusional because he believed he had received direct revelation from God and felt persecuted by the legal and religious systems of Utah. One examiner concluded that Lafferty did not understand the seriousness of the charges against him because Lafferty said he was at peace with his maker and would accept the death penalty if imposed (Letters of October 9-10, 1984).

Lafferty acted as his own attorney at the hearing on competency held October 23-24, 1984. He challenged the conclusions of the examiners, stating that he had been taught in his previous church to believe in personal revelation.[2] One of the examiners reported that he thought that Lafferty should be confined and treated for sixty days to see if competency could be restored. Lafferty called witnesses who had known him for several years. None of them had observed any signs of mental illness. Lafferty told the court that he still wanted to represent himself because he had his own best interests at heart. He knew that he had the right to the assistance of counsel and could accept their assistance; however, he did not want counsel speaking in his place. At the conclusion of the hearing, the court made no finding as to whether Lafferty suffered from a mental disease; however, the court found that, if Lafferty so suffered, the disease did not render him incapable of comprehending the nature of the proceedings against him or the punishment specified. Neither did it make him unable to assist counsel. The court found Lafferty competent (Hearing of Oct. 23-24, 1984).

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[2] Lafferty had been excommunicated from the Church of Jesus Christ of Latter-day Saints (Mormon) prior to the murders.

Less than two weeks later, a second petition for inquiry as to competency was filed when Lafferty assaulted a jailer. To the jailer, Lafferty had appeared to be irrational and out of control during the assault (Petition of Nov. 1, 1984). Four examiners[3] evaluated Lafferty and concluded that he was not mentally ill. In a joint letter, the doctors stated:

> Although he clearly has fundamentalist religious beliefs and a fervent interest in a strict interpretation of constitutional law, we feel that these do not approach the level of a thought disorder. He specifically does not meet the diagnostic criteria for "paranoia" or paranoid schizophrenia. Further, although he does have paranoid traits, these are associated with his religious beliefs and are not present to the threshold which is required to meet the diagnostic criteria for "paranoid personality disorder."

(Letter of Nov. 27, 1984). The court again found Lafferty competent to proceed (Minute entry of Nov. 30, 1984).

Lafferty's standby counsel filed a notice of insanity or diminished capacity defense on December 4, 1984. At a scheduling hearing, counsel assured the court that Lafferty had approved filing the notice; however, Lafferty had not yet decided whether to pursue the defenses and cooperate with the psychologists. His standby counsel thought Lafferty's reluctance to plead insanity might be the product of a mental illness (Hearing of Dec. 13, 1984).

At a subsequent hearing, Lafferty said that he did not want to admit guilt by raising an insanity defense.

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[3] One examiner had also participated in the earlier evaluation; the other three were different examiners.

After further in-court discussion, Lafferty agreed to talk with the psychologists in order to preserve the option of raising an insanity defense; however, he reserved judgment on whether to fully cooperate. He wanted to know their procedure before he decided to cooperate. After additional discussion about whether any statements to the examiners could be used against him at trial (with no assurances that they would not), Lafferty decided not to speak with the examiners. He specifically withdrew the notice of insanity defense (Hearing of Dec. 19, 1984).

On December 29, 1984, Lafferty attempted suicide by hanging. Although he was resuscitated, the attempt left him physically unable to proceed to trial as scheduled on January 3, 1985 (Hearing of Dec. 31, 1984).[4] A third petition to determine competency was filed by the prosecution (Petition of January 2, 1985). Based on the examiners' reports and observations of Lafferty, the court concluded that Lafferty was not competent to proceed at that time; however, the court noted that Lafferty's condition was improving. Lafferty was ordered to the State Hospital until competent (Hearing of January 28, 1985).

On March 18, 1985, Lafferty's standby counsel filed a second notice of intent to assert an insanity or diminished capacity defense (Notice of March 18, 1985). On March 19, 1985, the same four examiners who had concluded that Lafferty was competent in November reached the opposite conclusion (Letter of March 19, 1985). At the subsequent competency hearing, Lafferty informed the court that he was going to "take the Fifth" and refused to answer any questions. Lafferty conferred with counsel throughout the

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[4] Lafferty's brother was tried and convicted of first degree murder at a January 1985 trial. The jury could not unanimously agree on the death penalty; consequently, a life sentence was imposed.

hearing but refused to respond directly to the court or the prosecutor. The doctors testified that Lafferty's condition was similar to his condition before the suicide attempt; however, now they found that he had a paranoid delusional system, manifested by his "religiosity." Couching much of their testimony in terms of the competency standard delineated in *Dusky v. United States*, 362 U.S. 402 (1960), they opined that Lafferty's beliefs were not "rational" because they were not "consensually validated," i.e., they were not perceived in the same way by other people. One doctor had told Lafferty that he (the doctor) would not be required to testify about any events surrounding the crime that Lafferty revealed to him. Lafferty did not believe him and the doctor concluded that his disbelief was irrational. Another doctor testified that he simply was unwilling to believe that Lafferty's faith in divine intervention was rational. A third doctor testified that Lafferty would be competent if he put aside his religious beliefs. All of the doctors agreed that any minimal brain damage from the suicide attempt did not render Lafferty incompetent (Hearing of April 2, 1985).

Both parties submitted memoranda, citing to the *Dusky* standard, and the court found Lafferty competent to stand trial (Hearing of April 2, 1985 and Memorandum Decision of April 8, 1985). The court found that Lafferty knew and understood the nature of the proceedings against him and the possible penalties. Lafferty had shown no evidence of irrational behavior aside from the suicide attempt. All of his actions were undertaken in the context of his religious beliefs. In sum, the court concluded that a person is incompetent to proceed only if "he is so far out of it that to proceed would not comport with his rights to due process of law." The court found that Lafferty's due

process right would not be violated by proceeding to trial (Decision of April 8, 1985).

The question of Lafferty's competency was raised throughout trial and again after trial by a motion for new trial (Hearings of April 9 and 24, 1985; Volumes VIII and IX of the Trial Transcript; and Hearing of May 28, 1985). During the trial, Lafferty's counsel[5] attempted to lay a foundation for the lesser included offense of manslaughter based on a diminished mental state. After discussion with Lafferty, his attorney told the court that Lafferty had ordered him not to pursue that course. Lafferty told the court that he felt such a course would be perceived by the jury as an admission of guilt or as a plea bargain and Lafferty did not want to convey that impression. At that point, Lafferty's counsel reasserted his belief that Lafferty was not competent to make decisions about his defense. The court stated that it had seen nothing to indicate that Lafferty was not competent (Volume VIII of the Trial Transcript). In a later written decision, the court set forth its reasons for allowing Lafferty to restrain his attorney from pursuing the manslaughter defense. The court found Lafferty's reasoning to be rational, although his counsel thought his judgment poor. The court reaffirmed its earlier competency determination, writing:

> After observing the defendant through three days of voir dire examination of prospective jurors and three-and-a-half days of trial, the Court saw nothing which in any way cast doubt upon the validity of those findings or

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[5] During one of the pretrial hearings, Lafferty refused to affirmatively state on the record that he wished to represent himself. After that time, counsel conducted the defense for, and under the direction of, Lafferty (Hearing of 1:39 p.m., April 24, 1985).

> conclusions. On the contrary, the conduct of the defendant to that time in the trial demonstrated to the Court's satisfaction beyond a reasonable doubt that the defendant at all times fully comprehended the nature of the proceedings, that he knew and understood the charges being made against him, and he fully understood the punishment which could be imposed for those crimes.
>
> As part of the Court's continuing duty to monitor the competency of the defendant throughout the trial, the Court at the beginning of the voir dire examination requested [a court administrator] to continuously observe the defendant in the courtroom with respect to his ability to assist counsel in his defense. His affidavit is available to counsel and any reviewing Court. From the Court's own observation defendant's ability to assist counsel was unquestionably demonstrated throughout the trial.

(Minute Entry of May 16, 1985).

The jury convicted Lafferty of two counts of capital murder and, after a penalty hearing, unanimously agreed to impose the death penalty. After sentencing, defense counsel filed a motion for new trial arguing, in part, that Lafferty had not been competent to be tried. After reviewing memoranda and hearing argument, the court concluded that its earlier competency determination was supported by substantial evidence and that the court's observations during twelve days of trial supported the determination. The court further stated that "[u]nder any definition of the word 'rational' which the Court in Dusky

vs. Unites States [sic] could have intended," defendant had a rational as well as factual understanding of the nature of the proceedings and the punishment which could be imposed, and had the ability to consult with counsel (Hearing of May 28, 1985).

Lafferty's convictions and sentence were upheld by the state supreme court. He then filed a federal habeas corpus petition based, in part, on the competency issue.[6] The district court denied the petition. On appeal, the Court of Appeals for the Tenth Circuit granted the writ, vacated the convictions, and ordered the case returned to the state court for a retrial.

REASONS FOR GRANTING THE WRIT

The court of appeals, in refusing to accord the competency determination by the state trial court the presumption of correctness required in federal habeas corpus proceedings, has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

The ruling of the court of appeals granting Lafferty's petition conflicts with this Court's decision in *United States v. Ballard*, 322 U.S. 78 (1944), and with the decision of the Utah Supreme Court.

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[6] The state agreed that Lafferty had exhausted his state remedies before filing the federal petition.

I.

This Court Should Grant Certiorari to Review the Court of Appeals' Erroneous Refusal to Accord the Required Presumption of Correctness to the State Trial Court's Competency Determination Because the Decision of the Court of Appeals So Far Departs from the Accepted Course of Judicial Proceedings that this Court Should Exercise its Power of Supervision.

The majority[7] of the panel of the court of appeals held that the state trial court had applied an incorrect legal standard when it determined that Lafferty was competent to stand trial. It then declared itself free from according any presumption of correctness to the trial court's competency determination under 28 U.S.C. § 2254. *Lafferty v. Cook* (Appendix A [hereafter App. A] at maj. op. 5a).[8]

Although earlier cases had intimated that a competency determination was a mixed question of fact and law, in *Maggio v. Fulford*, 462 U.S. 111 (1983) (per curiam), the Court treated that determination as a factual one covered by 28 U.S.C. § 2254. More recently, the Court stated:

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[7] A strong dissent was registered by Judge Brorby.

[8] The opinion of the circuit court as reproduced in Appendix A was paginated separately in the majority and dissenting opinions. References to the pages in those opinions will be distinguished by the use of "maj. op." (majority opinion) and "dis. op." (dissenting opinion).

> A state court's determinations on the merits of a factual issue are entitled to a presumption of correctness on federal habeas review. A federal court may not overturn such determinations unless it concludes that they are not 'fairly supported by the record.' See 28 U.S.C. § 2254(d). . . . [U]nder § 2254's presumption of correctness, the state court's factual finding as to Baal's competence is binding on a federal habeas court.

Demonsthenes v. Baal, 495 U.S. 731, ___, 110 S.Ct. 2223, 2225 (1990) (citing *Maggio*, 462 U.S. at 117).

The court of appeals' majority opinion accepted that competency is a factual determination subject to § 2254; however, the majority refused to apply the presumption mandated by § 2254 because it concluded that the trial court had applied the wrong legal standard in making its determination. Thus, the court of appeals circumvented the prohibition against using federal habeas corpus review to second-guess a trial court's factual findings and conducted a de novo review of the facts. The majority concluded that there was evidence to support a finding of either competency or incompetency (App. A at maj. op. 20a-21a), and vacated Lafferty's convictions to allow retrial and a new competency determination.

The legal standard for competency consistently quoted in state and federal decisions is that found in *Dusky v. United States,* 362 U.S. 402 (1960) (per curiam):

> [I]t is not enough for the district judge to find that "the defendant [is] oriented to time and place and [has] some recollection of events," but that the "test must be whether he has sufficient present ability to consult with his

> lawyer with a reasonable degree of rational understanding--and whether he has a rational as well as factual understanding of the proceedings against him."

Id. (quoting the government's brief). By selectively reading the trial record, the court of appeals in the present case concluded that the trial court had not applied this standard. A full reading of the record shows the fundamental error in the court of appeals' conclusion.

The issue of Lafferty's competency was raised at three stages: pretrial, midtrial, and posttrial. During pretrial proceedings, four evaluations of Lafferty's competency were made. After the final pretrial competency hearing, the court issued a written decision which cited *Dusky*. Noting the paucity of facts upon which the *Dusky* standard was based, the court looked to subsequent case law to determine how to apply that standard. In conclusion, the court said:

> The Court believes that a defendant who may have some mental illness or defect is not thereby "incompetent to proceed" within the meaning of the law unless he is so far out of it that to proceed would not comport with his rights to due process of law. It is the Court's finding that defendant's mental condition is not such that his due process rights would be in any way denied by proceeding to trial.

(Memorandum decision of April 8, 1985).

Again, near the end of trial, Lafferty's counsel raised the issue of competency. On May 2, 1985, Lafferty stopped his counsel from pursuing evidence that could have led to a manslaughter instruction. The court and counsel fully explained to Lafferty the options available and his attorney strongly urged Lafferty to follow his advice.

Lafferty declined to do so, in effect stating that he was prepared to go with an all-or-nothing defense: either conviction of the original charge or acquittal. When his counsel raised the question of Lafferty's competence, the court again found that Lafferty was competent and stated that its reasoning would be put in the record at a later time. On May 16, 1985, the court issued a minute entry which outlined the reasons for its May 2 decision. The court said, "[T]he conduct of the defendant to that time in the trial demonstrated to the Court's satisfaction beyond a reasonable doubt that the defendant at all times fully comprehended the nature of the proceedings, that he knew and understood the charges being made against him, and he fully understood the punishment which could be imposed for those crimes." In addition, the court had observed Lafferty and found that "defendant's ability to assist counsel was unquestionably demonstrated throughout the trial." (Minute Entry of May 16, 1985).

After trial, Lafferty's counsel filed a motion for new trial based, inter alia, on the issue of Lafferty's competence. The court received memoranda, heard argument, then orally held that "under any definition of the word 'rational,' which the Court in *Dusky* . . . could have intended," Lafferty understood the nature of the proceedings and the punishment and had the ability to consult with his lawyer with a reasonable degree of rational understanding (Hearing of May 28, 1985).

The court obviously applied the *Dusky* standard at the posttrial proceeding because it couched its ruling in the language of the case. Its failure to use the precise *Dusky* language in its other competency findings does not mean that it applied an incorrect legal standard. The court's pretrial ruling is not a model of clarity; however, read as a whole, the ruling demonstrates that the court applied the

correct legal standard. At the last pretrial competency determination (the one with which the court of appeals took exception), the court found that Lafferty was oriented to time, place and things. But the court did not stop there (which clearly would have violated *Dusky*); it held that Lafferty "kn[ew] and underst[ood]" the charges, the nature of the proceedings, the possible punishment, that he had appointed counsel, and that he was expected, if he chose, to work with his counsel (Memorandum decision of April 8, 1985). The phrase "knows and understands" used by the court embraces both factual knowledge and rational understanding, and thus conveys the same meaning as the "rational as well as factual understanding" language found in *Dusky*.

Using colloquial language, the court also conveyed the appropriate standard when it wrote that a person is incompetent to proceed when "he is so far out of it that to proceed would not comport with his rights to due process of law." The trial court's articulation of the standard is consistent with the court of appeals' explanation of the *Dusky* standard: "[A] sufficient contact with reality [i]s the touchstone for ascertaining the existence of a rational understanding." (App. A at maj. op. 9a). A person who is "so far out of it that to proceed would not comport with his rights to due process of law" is a person who does not have "sufficient contact with reality." Both the trial court and the circuit court had the same standard in mind; they merely articulated it differently.

The midtrial ruling also demonstrates that the court understood and applied the correct standard. Instead of stating that Lafferty had a "rational as well as factual understanding," the court wrote that Lafferty "fully comprehended," "knew and understood," and "fully understood" what was occurring. The court also wrote that

Lafferty had "unquestionably demonstrated" his ability to assist counsel throughout the trial. The court's language demonstrates an understanding and correct application of the *Dusky* standard.

By misreading and parsing the record (App. A dis. op. at 24a), the majority was able to free itself of the presumption of correctness mandated by 28 U.S.C. § 2254 and substitute its judgment for the judgment of the trial court. The majority ignored the evidence that the trial court understood and applied the *Dusky* standard, even though it did not recite the talismanic words--"rational understanding"--throughout the proceedings. The result was unwarranted federal incursion into the province of a state trial court.

Cloaked with the erroneous conclusion that the trial court had applied an incorrect legal standard, the court of appeals has substituted its competency determination for that of the state court. In doing so, the court of appeals has so far departed from the accepted course of judicial proceedings that this case calls for an exercise of this Court's power of supervision.

II.

This Court Should Grant Certiorari Because the Court of Appeals' Reversal of the Trial Court's Competency Determination is in Conflict with Decisions of this Court and with the Decision of the Utah Supreme Court.

A. Conflict with a Decision of this Court.

In reweighing the evidence of competency, the majority accepted without question the examiners' conclusion that Lafferty was paranoid delusional (App. A at maj. op. 17a). It is clear that the examiners based their conclusion on their opinions that Lafferty's religious beliefs were not valid. Although the majority studiously avoided referring to religious beliefs in its opinion, it clearly relied on the examiners' opinions that Lafferty's religious beliefs were invalid to decide that the record did not support a finding of competency. This is in conflict with *United States v. Ballard*, 322 U.S. 78 (1944).

In *Ballard*, this Court reiterated that "'the [First] Amendment embraces two concepts,--freedom[sic] to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be.'" *Id.* at 86 (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 303-304 (1939)). The writers of the Constitution were aware of the "varied and extreme views of religious sects, . . . and of the lack of any one religious creed on which all men would agree." 322 U.S. at 87. Consequently, they fashioned a system of government "which envisaged the widest possible toleration of conflicting views." *Id.* The First Amendment affords to people the right "to answer to no man for the verity of his

religious views." *Id.* Either all religious beliefs are afforded the same protection against any legal attempt to determine their validity, or no religious beliefs may be protected. As long as the laws of society, which are designed to protect society, are not impinged on, a person's religious beliefs, and the manner in which he expresses them, cannot be interfered with. *Id.*

Lafferty was considered delusional solely because of his religious beliefs, not because of any actions he took which might have been unlawful. He claimed to have received revelations from God, which the examiners said reflected "Messianic grandiosity." *State v. Lafferty* (Appendix B [hereafter App. B] at 12b). "One doctor testified that he was simply unwilling to believe that Lafferty's faith in divine intervention was rational." *Id.* The examiners discounted Lafferty's belief that he had interacted with spirits, a belief they considered a symptom of paranoia. *Id.* In the field of psychology, experts may draw conclusions about a person's mental health based on his religious beliefs; from those conclusions, the expert can recommend courses of treatment, if necessary. For psychological purposes, an expert can determine if a belief is "consensually validated" (Hearing of April 2, 1985). However, as explicated by *Ballard*, the First Amendment does not allow the adjudication of the truth or falsity of a religious belief in the context of a criminal trial. A finding of incompetence based in whole or substantial part upon an accused's religious beliefs is tantamount to a judicial finding that those beliefs are false. This is forbidden by *Ballard*.

The majority decision would allow courts to base competency determinations on a psychological examiner's conclusion that the accused's religious beliefs are untrue. This flies in the face of *Ballard*. Therefore, the Court

should grant certiorari because the court of appeals has decided a federal question in a way which conflicts with an applicable decision of this Court.

B. Conflict with Decision of the Utah Supreme Court.

The court of appeals' willingness to judge Lafferty's competency based upon the psychological experts' rejection of Lafferty's religious beliefs also conflicts with the Utah Supreme Court's decision on direct appeal. In rejecting Lafferty's argument that the trial court had erred in finding him competent, the supreme court said:

> Our review of the record reveals the following: (i) the court-appointed examiners failed to explain and to support adequately the conclusory labels they affixed to Lafferty's mental state, thus making the affirmative evidence of incompetency weak; (ii) the examiners' diagnoses were based on the premise that Lafferty's religious beliefs and experiences did not accord with reality, an unsupportable [sic] premise on which the trial judge could not rely; and (iii) ample affirmative record evidence supports the trial judge's finding of competency.

State v. Lafferty (App. B at 8b). The court noted that the examiners' diagnoses were based on their assumptions that Lafferty's beliefs were invalid, and declared that it was a violation of due process and obviously unfair to require an

accused to prove the unprovable, i.e., the truth of his religious beliefs (App. B at 12b-13b).[9]

Although the court of appeals avoided addressing the religious aspect of Lafferty's "delusions," its implicit assumption that Lafferty's religious beliefs were invalid conflicts with the decision of the Utah Supreme Court. Accordingly, this Court should grant certiorari because the decision of the court of appeals conflicts with the decision of the highest state court.

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[9] In *People v. Kurobegovic*, 138 Cal.App.3d 729, 188 Cal.Rptr. 269 (App. 1982), a California appellate court observed:

> In what, at first, appears to be a bizarre discussion, a New York court, three decades ago, made the good point that even sincerely believed delusions do not, in all cases, equal incompetency to stand trial. The court pointed to examples, in the modern world, of men claiming divine powers who were not only competent for courtroom purposes but, indeed, highly effective:
>
> "Specifically, Joseph Smith, who claims to have found the Book of Mormon, and . . . [o]thers today, such as Father Divine, entertain similar ideas. Yet this type of individual without arguing as to the truth or falsity of their claims are perfectly competent, and have been found to be able to live in normal society; to show the judgment in business and in their daily life which is consistent with normal behavior however much the majority of individuals differ with them on their status as the Messiah." (*People v. Wolfe, supra,* (Co.Ct., Kings, 1950) 198 Misc. 695, 103 N.Y.S.2d 479, 482.)

188 Cal.Rptr. at 282-83.

CONCLUSION

For these reasons, petitioner requests that a writ of certiorari issue in this case.

Respectfully submitted,

R. PAUL VAN DAM
Attorney General of Utah
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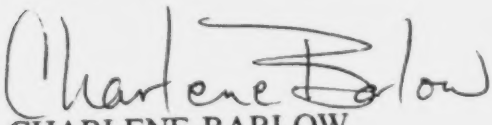
Solicitor General of Utah



CHARLENE BARLOW
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March 1992

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

RONALD WATSON LAFFERTY,	)	
	)	
Petitioner-Appellant,	)	
	)	
v.	)	No. 90-4010
	)	
GERALD COOK, Warden of the Utah State Prison,	)	
	)	
	)	
Respondent-Appellee.	)	

Appeal from the United States District Court
for the District of Utah
(D.C. No. 88-C-534G)

Michael D. Esplin (Gary H. Weight with him on the briefs) of Aldrich, Nelson, Weight & Esplin, Provo, Utah, for Petitioner-Appellant.

Sandra L. Sjogren, Assistant Attorney General (R. Paul Van Dam, Attorney General, with her on the briefs), Salt Lake City, Utah, for Respondent-Appellee.

Before SEYMOUR, BRORBY, and EBEL, Circuit Judges.

SEYMOUR, Circuit Judge.

Ronald Watson Lafferty was convicted in Utah state court of two capital felonies and sentenced to death. After his convictions and sentences were affirmed on direct appeal, see State v. Lafferty, 749 P.2d 1239 (Utah 1988), Lafferty filed a petition for habeas corpus relief in federal district court under 28 U.S.C. § 2254 (1988). During the federal proceedings, it was discovered that several transcripts of proceedings in state court had been omitted from the record on appeal. At the suggestion of the federal court, Lafferty filed a petition for rehearing with the Utah Supreme Court to enable it to consider Lafferty's claims in light of the complete record. That court determined that the additional transcripts did not warrant any change in its prior decision. See State v. Lafferty, 776 P.2d 631 (Utah 1989). Lafferty's federal habeas petition was then denied by the district court.

We conclude that the state trial judge applied the wrong legal standard in finding Lafferty competent to stand trial. Although we do not hold that Lafferty was incompetent as a matter of law, we do conclude that the record contains evidence from which a fact finder could have found him incompetent under the proper legal standard. We therefore grant the petition for writ of habeas corpus.

I.
FACTUAL BACKGROUND

Prior to the events giving rise to his convictions, Ronald Lafferty developed unorthodox religious views which resulted in his excommunication from the Church of Jesus Christ of Latter-Day Saints (the Mormon Church). His religious views also apparently played some role in his marital difficulties and his divorce. Lafferty's wife, Dianna, received encouragement in her decision to leave him from one of the

murder victims, Brenda Lafferty, who was the wife of Ronald's brother Allen. Dianna also was given help during her marital crisis from Richard W. Stowe and Chloe Low. Stowe, a Stake President in The Mormon Church, drew on Church resources to give Dianna food and money after she left Lafferty. Chloe Low, the wife of a Mormon Bishop, counseled Dianna and took her in for a short time.

Lafferty's religious views were shared by his brother Dan, and to some extent by two men, Charles Alan "Chip" Carnes and Richard M. "Rick" Knapp, whom Ron and Dan Lafferty met while traveling outside Utah. These four participated in prayer meetings at which they discussed Ron Lafferty's religious revelations, one of which concerned the "removal" of Lafferty's sister-in-law Brenda, her infant daughter Erica, Richard Stowe and Chloe Law. According to the trial testimony of Carnes and Knapp, on the day of the murders Ron and Dan Lafferty, Carnes, and Knapp drove to Brenda's home. Ron and Dan went into the house and killed Brenda and Erica by slitting their throats while Carnes and Knapp waited outside in the car. The four men then drove to the Low house, but the Lows were not there. After burglarizing the home, the men drove on to the Stowe home but missed the turn to the house. They then left Utah. The Laffertys were ultimately arrested in Reno, Nevada.

The State raised the issue of Lafferty's competency to stand trial early in the proceedings. After a series of examinations, hearings, and rulings, which are detailed below, the state trial court determined that Lafferty was competent.

Prior to this ruling and during a period when the court had found Lafferty to be incompetent, Lafferty's counsel filled a notice of intent to present an insanity defense at trial. After the final competency ruling, Lafferty and his counsel attended a telephone hearing at which the court attempted to ascertain whether Lafferty still intended to present the

defense. Under state law, a defendant who wishes to assert this defense must cooperate in a pretrial mental examination by two court-appointed experts. Lafferty stated that he did not intend to cooperate because he did not believe he was insane.

At a subsequent pretrial hearing, the court denied a renewed motion by Lafferty's counsel to withdraw and Lafferty's request to represent himself, because Lafferty would not personally state on the record that he wished to represent himself. However, the court informed Lafferty that he would have every reasonable opportunity to direct his counsel's strategy and presentation of the case. The court also considered Lafferty's renewed motion to assert an insanity defense. Lafferty's attorney represented to the court that Lafferty's prior refusal to cooperate, which Lafferty apparently did not recall, was based on a mistaken belief that Lafferty would still be able to present testimony at trial from experts who had already examined him during the competency proceedings. The attorney stated his intent to use that evidence, if he had control of the case, to the fullest extent possible. The court denied the motion to allow the insanity defense at trial, and reserved deciding whether evidence from the prior examinations would be admissible on the defense of manslaughter due to diminished mental capacity.

During the trial, the court ruled the expert medical evidence admissible on the lesser included offense of manslaughter. When Lafferty's counsel began to present the evidence, however, Lafferty refused to let him proceed, contrary to the attorney's forcefully expressed belief that the presentation was absolutely imperative. As a result of Lafferty's decision, his attorney was left with no option but to rest. Lafferty was convicted of capital murder and sentenced to death.

II.
COMPETENCY

Our review of the record in this case in light of the applicable law reveals that the state court's finding of competency is fundamentally flawed and therefore is not entitled to deference under the standard of review applicable in this habeas proceeding. When a federal court considers an application challenging a state court convictions under section 2254, the state court's determination of a factual issue "shall be presumed to be correct" unless the federal court, upon considering the relevant part of the state court record, "concludes that such factual determination is not fairly supported by the record." 28 U.S.C. § 2254(d)(8). Because competency is a factual issue subject to the presumption of correctness set out in section 2254, see Demosthenes v. Baal 110 S. Ct. 2223, 2225 (1990), our initial inquiry must be to assess whether the presumption is applicable here.[1] Thus, we must ascertain whether the competency determination was made under a correct view of the law, and if so, whether it is fairly supported by the record, considering "that part of the record of the State court proceeding in which the determination of such factual issue was made." 28 U.S.C. § 2254(d).

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[1] The presumption of correctness is not irrebuttable. If a state court determination is fairly supported by the record, and thus presumed correct, the petitioner in a federal evidentiary hearing may nonetheless prevail by shouldering the burden of establishing "by convincing evidence that the factual determination by the State court was erroneous." 28 U.S.C. § 2254(d). However, a petitioner is not required to disprove the state fact finding by convincing evidence until and unless that finding has been held entitled to the presumption of correctness. The threshold question is whether the competency determination is fairly supported by the record. See Demosthenes v. Baal, 110 S. Ct. 2223, 2225 (1990).

A. Standard for Determining Competency

Although competence is a factual issue, that term, as this case clearly demonstrates, is not self-defining. Because competency to stand trial is an aspect of substantive due process, see Pate v. Robinson, 383 U.S. 375, 378 (1966); Coleman v. Saffle, 912 F.2d 1217, 1224 (10th Cir.)(per curiam), cert. denied, 111 S. Ct. 22 (1990); Bouchillon v. Collins, 907 F. 2d 589, 592 (5th Cir. 1990); Davis v. Wyrick, 766 F.2d 1197, 1201 (8th Cir. 1985), cert. denied, 475 U.S. 1020 (1986), the legal standard by which competency is to be evaluated is constitutionally mandated. Accordingly, the components of that standard, required as they are by the Constitution, do not vary according to the views of a particular court. The Constitution can require but one gauge against which to determine whether, because of his mental condition, a defendant's due process rights are violated by requiring him to stand trial. The content of the standard of competency is therefore a question of law which we review de novo.

The Supreme Court set out the legal test for competency in Dusky v. United States, 362 U.S. 402 (1960) (per curiam):

> "[I]t is not enough for the district judge to find that 'the defendant [is] oriented to time and place and [has] some recollection of events,' but that the 'test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding -- and whether he has a rational as well as factual understanding of the proceedings against him.'"

Id. Although the Dusky standard was first articulated in the context of a federal prosecution, the Supreme Court has indicated that this standard is to be applied in federal habeas review of state proceedings as well, see Drope v. Missouri, 420 U.S. 162 (1975), and the courts have done so, see, e.g.,

Coleman, 912 F.2d at 1224 & n.8; Bouchillon, 907 F.2d at 592; Balfour v. Haws, 892 F. 2d 556, 559 (7th Cir. 1989); Davis, 766 F.2d at 1201.

The aspect of the Dusky standard that is the critical focus or attention in this case is the requirement that a defendant have a rational as well as factual understanding of the proceedings against him. While the Dusky opinion itself does not set out the facts underlying its articulation of this element of the competency test, that evidence is recited in detail in the circuit opinion which the Supreme Court reversed. See Dusky v. United States, 271 F.2d 385, 387-89 (8th Cir. 1959). The relevant record at the competency hearing there consisted of several written medical reports and the testimony of one Doctor Sturgell, "whose testimony was in substantial conformity with the reports in evidence." Id. at 389. That testimony, which is quoted at length below, is critical both because it illuminates the Supreme Court's intent with respect to the meaning to be given "rational understanding," and because the description of the defendant's mental state there is strikingly similar to the essentially undisputed mental condition of Lafferty.[2]

> "[Doctor Sturgell] explained the statement in Doctor Moreau's report that the defendant was oriented as to time, place and person, as follows:
>
> > 'This means that he is able to know the day of the week, the hour, the place in which he finds himself geographically, and the circumstances of

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[2] Unlike the dissent, we do not attach significance to the fact that the defendant in Dusky was ultimately found competent in October 1960. The first competency hearing, which was the one the Supreme Court held to be constitutionally infirm, was held in January 1959, almost two years earlier, and was based on reports made prior to that. The defendant's mental condition in October 1960 simply sheds no light on the Supreme Court's holding in Dusky or on our inquiry here.

his present situation. He knows he is in a court room; he knows the day of the week and the day of the year, and he knows that you are his attorney and Judge Smith is the judge. This is the orientation to person. He knows it all.'

Doctor Sturgell also expressed the opinion that the defendant understood what he was charged with, knew that if there was a trial it would be before a judge and jury, knew that if found guilty he could be punished, and knew who his attorney was and that it was his duty to protect the defendant's rights. It appeared from Doctor Sturgell's testimony also that the defendant had been able to furnish, with substantial accuracy, information as to his past history and as to at least some of the events leading up to the occurrence upon which the indictment was based. The Doctor expressed the opinion that the defendant would be unable properly to assist his attorney in his defense 'because I do not think that he can properly interpret the meaning of the things that have happened. I don't think he can convey full knowledge of his actual circumstances . . . due to an inability to interpret reality from unreality . . . to suspicions of what is going on, . . . to confused thinking, which is part of his mental illness.' The Doctor also testified that the defendant 'would be able to tell his attorney of the events, as he recalls them, as interpreted by the thinking which is directly connected with his mental illness,' which could result in a false factual statement to his attorney."

Id.

It is beyond dispute that the Supreme Court's legal definition of competency, under which the conviction of a defendant in the above circumstances was set aside, mandates

the conclusion that a defendant lacks the requisite rational understanding if his mental condition precludes him from perceiving accurately, interpreting, and/or responding appropriately to the world around him. Thus, he must have "a rational as well as factual understanding of the proceedings against him." Dusky, 362 U.S. at 402; see also United States v. Hemsi, 901 F.2d 293, 296 (2d Cir. 1990) (petitioner had intellectual understanding of charges against him but his impaired sense of reality substantially undermined his judgment and prevented him from cooperating rationally with his lawyer). Although the facts in each case vary, the circuits addressing competency after Dusky, including our own, have used a sufficient contact with reality as the touchstone for ascertaining the existence of a rational understanding. See, e.g., Coleman, 912 F.2d at 1227; Hemsi, 901 F.2d at 296; Balfour, 892 F.2d at 561; Strickland v. Francis, 738 F.2d 1542, 1551-52 (11th Cir. 1984).[3]

B. Application of the Standard

The state trial court's finding of competency in this case is fatally flawed by that court's assessment under a standard that is not only inconsistent with Dusky, but was specifically

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[3] The dissent takes issue with our citation of these cases as support for our conclusion that Dusky requires a sufficient contact with reality, apparently because the dissent views the cases as factually distinguishable. However, the relevant consideration is not the type of mental condition with which a particular defendant is afflicted, nor the way in which the condition manifests itself. Rather, the critical inquiry is whether the defendant's mental condition, however it may be labeled and whatever symptoms it may produce, prevents the defendant from having a rational or factual understanding of the proceedings against him or significantly prevents the defendant from consulting with his lawyer. The cases cited are significant because each of them recognizes that this inquiry is required by Dusky.

rejected by the legal test for competency established in that case. In addition, when the evidence adduced on this issue is viewed under the proper standard, the record indisputably does not provide the fair support required to accord the finding a presumption of correctness.[4]

The first competency assessment occurred at the trial court's direction after the Laffertys refused appointment of counsel and indicated that they would claim the state was without jurisdiction to try them because God directed their action.[5] The competency hearing was held on October 23-24, 1984, following examination by two alienists. Both alienists concluded in their reports that Lafferty was not competent, and one of them, Dr. Phillip Washburn, testified

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[4] By stating that the state court's determination of competency is entitled to a presumption of correctness, see Dissent at 5, the dissent simply begs the pivotal question in this appeal by assuming the answer. The initial inquiry must be whether the Utah court made its fact findings under the correct legal standard of competency. It is elemental that fact finding made under an erroneous view of the governing law cannot be presumed correct. Only after concluding that a state court used the proper standard does a habeas court turn to the issue of the presumption of correctness. The dissent here has placed a factual cart before the legal horse.

[5] At the arraignment, Ron Lafferty questioned the court about whether it could deal with spiritual matters. After the court told him that he was in a temporal court, not a spiritual one, Lafferty declined to enter a plea:

> "MR. RON LAFFERTY: I guess I'm not [prepared to enter a plea], your honor, because of the statement that you made because of the religious overtones and spiritual overtones in this matter. You just mentioned that this court doesn't deal with that sort of thing so it seems to me that you--perhaps you don't have jurisdiction here. As a result, I'm not prepared to enter a plea because I don't want to give up my right to challenge the jurisdiction of this court, sir."

Hearing on September 21, 1984 (arraignment proceedings), at 11.

to that opinion at the hearing. Dr. Washburn tentatively diagnosed defendant's mental illness as a paranoid delusional state. The court concluded after that hearing that Lafferty was competent.

A second hearing was held on November 28, 1984, following an evaluation and report by four expert employees of the Utah State Hospital, Van O. Austin, M.D., Robert J. Howell, Ph.D., Peter Heinbecker, M.D., and Jess Groesbeck, M.D. These examiners concluded that Lafferty was competent and the trial court agreed.[6] The next hearing took place on January 28, 1985, following a suicide attempt by Lafferty and resulting organic brain damage due to oxygen deprivation. The court found Lafferty incompetent, remanded him to the state hospital for further treatment, and scheduled another hearing in early April. This turn of events forced the state to try Dan Lafferty separately. He was convicted on all counts and received a sentence of life imprisonment when the jury could not agree to impose the death penalty.

The last competency hearing before Lafferty's trial took place on April 2, 1985. The same four examiners employed by the state submitted a report after twenty days of evaluation with respect to Lafferty's treatment and mental condition. The report concluded that Lafferty was not competent due to a paranoid delusional system that severely impaired his ability to perceive and interpret reality. Drs. Howell, Austin, and Groesbeck also testified in support and explanation of the opinions set out in their report. The gist of their testimony was that while Lafferty physically knew the nature of the proceedings against him, and their possible consequences, he was unable as a result of his paranoid delusional system to

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[6] It should be noted that during the penalty phase of the trial, both Dr. Groesbeck and Dr. Howell testified that they had come to believe their November 1984 report finding defendant competent was incorrect.

interpret them in a realistic way. In this delusional system, Lafferty believed that the examining doctors, the court system and personnel, and his own lawyer were part of a corrupt man-made order which he rejected and which he believed was actually on trial. Because of these delusional beliefs, the doctors concluded that Lafferty could not cooperate with a lawyer. They stated their belief that his mental illness had degenerated to a state of incompetency as a result of the organic brain damage arising from the suicide attempt.

The prosecution offered testimony by its own expert, Dr. Eugene Thorne, a clinical and forensic psychologist and an attorney, who expressed the opinion that Lafferty was competent to stand trial. Dr. Thorne had not examined Lafferty but instead had spent four hours reviewing documents given him by the prosecution, a review he himself described as "cursory."[7] Hearing, April 2, 1985, at 61. When asked on cross-examination what the other doctors had used in evaluating the existence of paranoia, Dr. Thorne said: "Well, they probably used mostly interview and observation." Id. at 67-68. He conceded that he would have had a better opportunity to evaluate the extent of Lafferty's paranoid delusional system if he had spent hours with him in consultation and observation as did the other doctors. Id. at 70. Dr. Thorne expressed "concerns" when given descriptions of some manifestations of Lafferty's mental condition, such as Lafferty's belief that his spirit was physically intermingling with the spirits of other people on the ward. Dr. Thorne

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[7] In determining that the state court's conclusion of competency was fairly supported by the record, the Supreme Court in Demosthenes, 110 s. Ct. at 2225, emphasized that three psychiatrists who had examined the petitioner had found him competent, whereas the only evidence supporting a contrary opinion was the affidavit of a psychiatrist who had not examined the petitioner but instead had only reviewed the reports of the other psychiatrists.

nonetheless opined that Lafferty's belief in a judicial conspiracy that included his lawyer did not detract from Lafferty's ability to aid his defense, and that Lafferty's refusal to assist his attorney, while a product of his delusion, was a conscious choice. Dr. Thorne stated that he believed the existence of a paranoid delusional system was a straw dog, irrelevant to the issue of competency. Id. at 75.

On recross-examination, defense counsel asked the following questions and received the following responses from Dr. Thorne:

> "Q: [I]f some one is not perceiving reality in a way that a psychologist or a psychiatrist would expect, within a wide range or what we see in society, and that could lead to the conclusion that a person was not competent to stand trial. Correct?
>
> "A: -- if I might just respond to that, and so that you understand where I'm coming from: Maybe I don't understand the issue clearly, and see if I don't. I understand the issue to be whether he has the ability, not whether something would interfere with his ability. And, if you would keep that distinction there, I think I could address your questions a little better. You are saying: 'Could something interfere with his ability?' Yes, I suppose something could interfere; but the question isn't whether it could, but whether he has the ability.
>
> "Q: If you say in the raw sense Mr. Lafferty has the ability, are you then saying that if he has a paranoid delusional system that this court believes does actively entangle itself so that Mr. Lafferty does not perceive reality as it is, are you saying that, somehow, he still has the ability and, therefore, is competent?
>
> "A: Yes. That's exactly what I'm saying.

"Q: All right. Well, if he is mentally ill, just assume that for a moment, as Mr. Watson did, --

"A: Right.

"Q: -- that he has a paranoid delusional system, and that it is interfering with his perception of reality. Okay?

"A: Yes.

"Q: Now, do you still think he's competent to stand trial?

"A: I do, as long as he meets the standards of competency. The mental illness is irrelevant as to whether or not he meets the standards of competency, as I understand them, sir.

"Q: Do you mean to tell me that . . . [i]f a person understands that he's in a courtroom, understands Mr. Watson's there trying to convict him understands he has a court-appointed attorney, and he see's the judge there, is a person who can physically see that say: yes, I'm in the courtroom; he's competent to proceed?

"A: The standard is not that stringent. The standard is that he is able to assist you, Mr. Johnson, in his defense, and understands the nature of the proceedings and the punishment associated with the charge, if found guilty."

Id. at 75-77 (emphasis added).

"Q: So if you can see and hear and talk, you are competent to stand trial.

"A: Well, you are partly there, you are half-way there.

"Q: Well, what's the other half?

"A: Well, the other is that he understands, that he understands what the nature of the proceedings are;

that he's able to participate in those proceedings if he so chooses."

"Q: Let me stop you there. To 'understand the proceedings,' that means kind of understanding them as you and I do, but not exactly as you and I, but certainly in some range of normal. Correct?

"A: Correct. It was obvious that the defendant didn't understand the nature of the Fifth Amendment, although he did have some idea that he didn't have to testify. Go ahead.

"Q: But if he sees this system, if he sees the trial and the claim in a totally unrealistic sense, as determined by a psychiatrist or a psychologist, that's the type of thing you are talking about that would interfere with his ability to rationally understand. Correct?

"A: Well, that would certainly go to an insanity defense, but it certainly wouldn't go to a competency one."

Id. at 80-81 (emphasis added). In Dr. Thorne's opinion, therefore, even if Lafferty had a paranoid delusional system that actively prevented him from seeing reality as it is, he was nonetheless competent.

In a written decision following this hearing, the trial court determined that Lafferty was competent. The court found Lafferty to be oriented to time and place and aware of the nature of the court proceedings. The court then stated:

"Although the defendant may be operating within a paranoid delusional system, there is no evidence except a suicide attempt, of irrational behavior within that system or within the system of his religious beliefs. In fact, his refusal to cooperate, assist counsel or admit that he is amenable to the laws of

the State of Utah are all consistent with his paranoia and any delusional system pertaining to religion."

Memorandum Decision, April 8, 1985, at 7. In rejecting the examiners' finding of incompetency, the court stated its opinion that

> "the examiner's [sic] conclusions are based almost entirely upon the 1960 case of Dusky v. United States, 360 U.S. 402 (1960) and that they have misapplied the law enunciated by that case. Dusky is a very short per curiam opinion with no underlying facts stated therein, and it is not possible to ascertain from the opinion the context in which the words relied upon by the examiners were used. Subsequent cases, however, have delineated what the Dusky standard is, which have been set forth in the State's memorandum, including Weiter [sic] v. Settle, [193 F. Supp. 318 (W.D. Mo. 1961)], and those cases do not mandate a finding of 'incompetency to proceed' with respect to defendant Ronald W. Lafferty."

Id. at 10-11.[8]

The excerpts quoted above reveal unambiguously that the state trial court's evaluation of Lafferty's competency was infected by a misperception of the legal requirements set out in Dusky, apparently caused by the court's lack of knowledge of the underlying facts in that case. Indeed both Dr. Thorne and the court appear to have embraced the view that factual understanding alone is sufficient, a view, as discussed above, that is totally contrary to the circumstances in Dusky itself

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[8] Notwithstanding the state court's determination that defendant was competent to stand trial, it found that "Mr. Lafferty lacks the ability to engage in a rational decision making process regarding the acceptance of mental treatment as demonstrated by evidence of inability to weigh the costs and benefits of treatment." Id. at 8.

and that has been rejected by the cases applying the Dusky test.[9] This court cannot accept as consistent with Dusky and its progeny a finding of competency made under the view that a defendant who is unable to accurately perceive reality due to a paranoid delusional system need only act consistently with his paranoid delusion to be considered competent to stand trial.

In making its determination under an erroneous interpretation of Dusky, the state court in essence accepted the experts' view that Lafferty suffered from paranoid delusions which drove his decisions in these proceedings. Indeed, there does not appear to be any material dispute as to Lafferty's mental condition, in view of the testimony of Dr. Thorne that in his opinion Lafferty's paranoid delusions did not render him incompetent even if they compelled his defense decisions. When the evidence is evaluated under a proper view of Dusky, the record generated by the pretrial proceedings does not support a holding as a matter of law that Lafferty was competent.

In so concluding, we recognize that a defendant's trial demeanor may in some cases constitute relevant evidence on the issue of competency. The state court's reliance in this case on its assessment of Lafferty's demeanor at trial to bolster its pretrial finding of competency, however, is unpersuasive for several reasons. First, section 2254(d) expressly states that a federal court on habeas review of a state fact finding must determine whether that finding has fair support based on "that part of the record of the State court proceeding in which the determination of such factual issue was made." 28 U.S.C. § 2254(d)(8). The critical

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[9] The Weiter [sic] case, which the state court quoted and upon which it primarily relied, does not cite Dusky or purport to interpret it. See Wieter v. Settle, 193 F. Supp. 318 (W.D. Ma. 1961).

competency determination here occurred on April 8, 1985, prior to Lafferty's trial. It was this finding of competency that enabled Lafferty to make the crucial decision to waive an insanity defense, contrary to the forceful advice of his frustrated attorney, by refusing to cooperate in the mental examinations which are state-law prerequisites to assertion of the defense at trial. Accordingly, we are statutorily required to look only at the pretrial proceedings in evaluating whether the pretrial competency determination finds fair support in the record.[10]

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[10] We disagree with the dissent's statement that "[n]o meaningful distinction can be made between those cases addressing a trial court's determination of competency and those addressing a determination of entitlement to a hearing on competency." Dissent at 9 n.4. When, as in the instant case, a competency hearing has been held, the issue on habeas review is whether the state court's competency finding, assuming that the determination was made under the proper standard, is entitled to a presumption of correctness. However, section 2254(d)(8) directs us when doing so to consider that part of the record of the state proceeding upon which the determination was made, in this case those proceedings held prior to trial.

When, on the other hand, no state court competency hearing has been held and the defendant has proceeded to trial without such a hearing, the issue is not whether the state record supports a finding of competency. Rather the inquiry on habeas is whether the state court denied the defendant his right to due process by ignoring evidence, including evidence at trial, indicating that the defendant might not be competent, and that a hearing to ascertain competency was therefore required. Evidence of a defendant's trial demeanor is of course relevant in making this assessment because the state court's duty to inquire as to competency continues through trial.

By failing to make the distinction set out above, the dissent incorrectly relies on cases such as Drope v. Missouri, 420 U.S. 162 (1975); Pate v. Robinson, 383 U.S. 375 (1966); and Coleman v. Saffle, 912 F.2d 1217 (10th Cir.), cert. denied, 111 S. Ct. 22 (1990)(per curiam), which involve the denial of a hearing, as support for its

Moreover, uncontradicted expert testimony indicates that the physical demeanor of a person suffering from a paranoid delusional system sheds no light on the extent to which his defense decisions are driven by a deluded perception of reality. Indeed, as was brought out by expert testimony at the first competency proceeding, "this kind of illness [is] so very difficult to recognize by just untrained people." Hearing, October 23-24, 1984, at 67. As was the case here, a defendant suffering from this illness may outwardly act logically and consistently but nonetheless be unable to make decisions on the basis of a realistic evaluation of his own best interests. See, e.g., Bouchillon, 907 F.2d at 593-94.

Finally, the state court's assessment of the trial demeanor evidence upon revisiting the competency issue during and after trial is of doubtful validity given the court's mistaken view of Dusky's rational understanding requirements. In reaffirming its pretrial determination after hearing argument on Lafferty's post-trial challenge to the competency finding, the court clearly proceeded under its earlier interpretation of Dusky, stating that it was "convinced that the factual findings of competency to proceed were supported by substantial evidence, and there was no error with respect to either the fact or the law as to competency to proceed." Hearing, May 28, 1985, at 57-58. The state court paid lip service to Dusky's requirement that competency requires a rational understanding which is different from, and more than, factual understanding. See Dissent at 1-2. Nonetheless, in view of the evidence that Lafferty's illness interfered with his accurate perception of reality, the court's statements that Lafferty's understanding was rational simply renders that requirement a nullity. Indeed, as revealed by its pretrial

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argument that we should look at trial demeanor to support a competency determination made prior to trial.

ruling finding Lafferty competent, the trial court believed that competency merely requires no more than satisfaction "of the simple 'understand and assist' standard of the common law," Memorandum Decision, April 8, 1985, at 11.

Under the state court's view, then, a defendant suffering from paranoid delusions is to be held competent to make decisions on how best to present his mental state to a judge and jury even though that mental illness may strip him of the ability to realistically determine where his best interests lie. Indeed, a defendant operating in a paranoid delusional system may well believe that he is not mentally ill and therefore, as did Lafferty, refuse to present the defense at all. This result cannot be reconciled with the requirements of due process.[11]

In sum, we conclude that the state court's finding of competency cannot stand given the court's failure to proceed under a proper understanding of the due process requirements

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[11] We do not perceive any relevance in the dissent's observation that tax protestors often behave in bizarre ways and may make decisions contrary to their best legal interests. See Dissent at 24 n.15. The dissent assumes such defendants to be competent, thus bypassing the critical inquiry in the instant case, and then asserts that because those defendants are competent, Lafferty must also be competent because he too refused to follow the advice of his counsel. Even assuming all tax protestors are competent, the fact that some people who hold wrong beliefs may nonetheless be competent proves nothing about Lafferty's condition. The issue is not whether particular beliefs are "wrong," but whether those beliefs are the product of a deluded view of reality that significantly prevents a defendant from consulting with his lawyer. To say on this record as a matter of law, as the dissent apparently wishes to do, that Lafferty could have consulted with his lawyer if he had chosen to do so is either to disregard the substantial evidence that Lafferty's mental disease rendered him unable to make that choice, or to conclude that Dusky does not require decisions based on reality. The first alternative is precluded by the record, and the second is precluded by the law.

set out in Dusky. We further conclude that a competency determination cannot be made on this record as a matter of law. Finally, we hold that the passage of time has rendered impractical a remand for an after-the-fact hearing on competency. See Drope, 420 U.S. at 183; Pate, 383 U.S. at 387 (inherent difficulty of retrospectively determining competency aggravated by six year delay). Accordingly, we grant the writ, and vacate the conviction and sentence.[12] The state is of course free to retry Lafferty. Should he again raise his competency to stand trial, that assessment can then be made under the proper legal standard.

PETITION GRANTED, JUDGMENT AND CONVICTION VACATED.

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[12] Lafferty raises numerous other constitutional challenges to his convictions and sentences. In view of our resolution of the issue of his competency to stand trial, we need not address his remaining arguments.

Lafferty v. Cook, No. 90-4010
BRORBY, Circuit Judge, dissenting.

Insofar as the majority characterizes Mr. Lafferty's competence to stand trial as the pivotal issue in this case, I must agree. It is a troublesome issue indeed. I must respectfully dissent, however, from the loose interpretation of governing law and the myopic review of the record necessary to support the majority's opinion vacating Mr. Lafferty's conviction.

I. COMPETENCY STANDARD

At the threshold, we recognize that competency to stand trial is an issue of constitutional significance. See Pate v. Robinson, 383 U.S. 375, 378 (1966). Therefore, we must first determine whether the trial court applied the appropriate test for determining competency. This determination is most certainly a question of law subject to de novo review.

The time-honored constitutional test to determine competency to stand trial is whether an accused has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding -- and whether he has a rational as well as factual understanding of the proceedings against him." Dusky v. United States, 362 U.S. 402, 402 (1960). The record unmistakably reveals this is the test applied by the Utah trial court:

> The Court wants to also make it clear that, as to the previous finding by the Court that the defendant was not incompetent to proceed, that should in no way be construed as merely a factual finding. Under any definition of the word "rational," which the Court in Dusky v. United States could have intended, this Court believes, from all of the evidence, including the Court's observation on nine trial days

and also on numerous other times, at numerous other times prior to that trial, believes that the defendant's:

(a) Understanding of the proceedings, in his understanding of the punishment which could be imposed, that is the nature of the proceedings, the punishment that could be imposed; and his ability to consult with his lawyer, with a reasonable degree of rational understanding, are believed and held to be rational as well as factual understandings.

Notwithstanding the trial court's full and accurate recitation of the applicable test, the majority embarks on a quest to articulate the one true legal definition of competency. Focusing in particular on the definition of "rational understanding," the majority discriminately cites cases which are factually distinct -- cases leaving little doubt as to the petitioners' incompetence or the necessity of a competency hearing -- to conclude the state court wrongly found Mr. Lafferty competent.

For example, the majority quotes and relies heavily upon the circuit court opinion which led to the Supreme Court's Dusky decision. Maj. op. at 8-9. However, when characterizing this excerpt as the basis of "rational understanding" the majority fails to address the significant underlying factual differences between petitioners Dusky and Lafferty. Dusky was diagnosed as a schizophrenic suffering from "visual hallucinations, tension, insomnia, emotional turmoil, ambivalence, morbid preoccupations, depression, feelings of inadequacy and unworthiness, and a long history of alcoholism and inadequacy." Dusky v. United States, 271 F.2d 385, 388 (8th Cir. 1959). Mr. Lafferty never exhibited this range of behaviors. The majority also fails to note that despite this long history of mental disorders, on remand Dusky was found competent, and was tried and convicted a second time. Dusky v. United States, 295 F.2d 743 (8th Cir.

1961), cert. denied, 368 U.S. 998 (1962). Most significantly, the standard applied on remand and upheld by the Eighth Circuit as characterized by then-Judge Blackmun[1], is strikingly similar to that articulated and applied by the Utah court in the present case.

The other cases cited by the majority represent unfortunate individuals who, among other things, believed they sported golden aura's [sic] when they were around

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[1] Dusky appealed his second conviction. The Eighth Circuit, per then-Judge Blackmun, noted the following with respect to Dusky's competency to stand trial:

> The present appeal is the culmination of that reversal and remand. The required new hearing to ascertain the defendant's competency to stand trial was held October 3, 1960 .... Dr. John Kendall Dickinson, a staff psychiatrist at the Springfield Medical Center, whose testimony at the subsequent trial is hereinafter described, and Dr. Joseph C. Sturgell, chief of the psychiatric staff there, both testified at that hearing. Their testimony and the June 1960 written report of the Center's staff were to the effect, specifically, that the defendant was then oriented as to time, place and person; that he had some recollection of the events surrounding the offense with which he was charged; that he had present ability to consult with his lawyer with a reasonable degree of rational understanding; that he had a rational as well as a factual understanding of the proceedings in court against him; and that, generally, he was competent to stand trial. Defense counsel expressed his confidence in the psychiatrists and acknowledged to the court that he was not then experiencing the difficulty in consulting and working with his client which he had encountered at the time of the first trial. It will be noted that the evidence produced at this hearing was along the exact lines of the test set forth by the Supreme Court at page 402 of 362 U.S. Judge Ridge accordingly found that the defendant was competent to stand trial.

Dusky v. United States, 295 F.2d at 746.

Buddhist monks, blew kisses to prosecutors while in the courtroom and were unable to maintain their composure, United States v. Hemsi, 901 F.2d 293, 294 (2nd Cir. 1972); or who were never able to communicate with their lawyer, assist in their defense and who thought they were being pursued by the CIA, Strickland v. Francis, 738 F.2d 1542, 1544 (11th Cir. 1984); or who were the childhood victims of sexual abuse at the hands of a prostitute and who now suffered from Post-Traumatic Stress Disorder because of their Vietnam wartime experiences, Bouchillon v. Collins, 907 F.2d 589, 590 (5th Cir. 1990). The majority fails to discuss the relevance of these extreme conditions to each individual competency determination or to the determination of Mr. Lafferty's competence. The majority appears to suggest that a court's assessment of a particular defendant's contact with reality may and should be divorced from an analysis of the type and manifestation of the defendant's mental condition. Maj. op. at 11 n.3.

Using the diagnostic nomenclature from these cases, sans their factual circumstances, to support the notion that reality is the touchstone for ascertaining the existence of a rational understanding strains legal logic. These cases do not establish as a matter of law that the Utah court employed an improper legal standard. They merely illustrate that "rational understanding" eludes any attempt at uniform definition. Nonetheless, the majority has utilized these cases as a constitutional smoke screen behind which it impermissibly substitutes, de novo, its findings as to Mr. Lafferty's rational abilities for those of the trial court.

II. SCOPE OF REVIEW

On federal habeas review, a state court's determination on the merits of a factual issue is entitled to a presumption of

correctness. 28 U.S.C. § 2254(d) (emphasis added);[2] Case v. Mondragon, 887 F. 2d 1388, 1392 (10th Cir. 1989) (explicit and implicit fact findings by state trial and appellate courts entitled to presumption of correctness), cert. denied, 110 S. Ct. 1490 (1990); Graham v. Wilson, 828 F.2d 656, 658 (10th Cir. 1987) (federal court must accord presumption of correctness to state court fact findings unless statutory exceptions apply), cert. denied, 484 U.S. 1069 (1988). The United States Supreme Court characterizes competency to stand trial as a factual issue. Maggio v. Fulford, 462 U.S. 111, 117 (1983). As such, the Utah court's conclusion regarding Mr. Lafferty's competency is entitled to such a presumption. Demosthenes v. Baal, ___ U.S. ___, ___, 110 S. Ct. 2223, 2225 (1990). We are therefore constrained to accord deference to the Utah court's finding that Mr. Lafferty was competent to stand trial unless that finding "is not fairly supported by the record." 28 U.S.C. § 2254(d)(8).[3]

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[2] Section 2254(d) reads in relevant part:

> In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless ....

(Emphasis added.)

[3] The Supreme Court has directly addressed this threshold issue:

> A state court's determinations on the merits of a factual issue are entitled to a presumption of correctness on federal habeas review. A federal court may not overturn such determinations unless it concludes that they are not "fairly supported by the record." See 28 U.S.C. § 2254(d). We

The parameters of our inquiry are well defined by plain, unambiguous statutory language. Section 2254 reads, in pertinent part:

> (d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be

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> have held that a state court's conclusion regarding a defendant's competency is entitled to such a presumption. Maggio v. Fulford, 462 U.S. 111, 117 (1983).... Accordingly, under § 2254's presumption of correctness, the state court's factual finding as to Baal's competence is binding on a federal habeas court. See Maggio, supra; see also Marshall v. Lonberger, 459 U.S. 422 (1983) (§ 2254(d)'s presumption of correctness required federal habeas court to accept state court's factual findings on the issue of respondent's credibility).

Baal, 110 S. Ct. at 2225.

We are not at liberty to adjust this analysis. Nonetheless, the majority would have us insert an additional, preliminary step into our review process. At the threshold, the majority would have us determine whether the presumption is applicable by reviewing the record to determine whether the competency finding was a proper factual finding. See maj. op. at 6. This approach is circular and unsupported by authority. Furthermore, the result of this approach directly contravenes the presumption of correctness standard Congress mandated in § 2254(d). The relevant inquiry under this standard is the correctness of the competency finding, not the applicability of the presumption. To suggest otherwise is to sidestep precedent and to distort the analysis.

correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit --

....

> (8) or unless that part of the record of the State Court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:
>
> And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

28 U.S.C. § 2254(d)(8) (emphasis added).

The majority has purposely excised that phrase of the habeas statute which says we examine "that part of the record of the State court proceeding in which the determination of

such factual issue was made," 28 U.S.C. § 2254(d)(8), as support for its restricted review of the record. Only by ignoring Defendant's own words and behavior exhibited before, during and after the trial, and by ignoring crucial observations made by the judge and the attorneys can the majority conclude that the Utah court's competency determination is not fairly supported by the record.

This approach does not comport with the full text of the federal habeas statute. The plain and unambiguous language of the statute requires us to consider "reliable and adequate written indicia," which necessarily includes the trial transcript. It also requires us to consider the record "as a whole."

The majority's selective examination of the record is also inconsistent with Supreme Court and Tenth Circuit precedent. In Pate, 383 U.S. at 386, the Supreme Court acknowledged that a defendant's "demeanor at trial might be relevant to the ultimate decision as to his sanity ...." (Emphasis added.) The Court further stated that a defendant's demeanor at trial cannot be relied upon to dispense with a competency hearing. Id. The implication of Robinson is that demeanor at trial is relevant to a determination of competency.

Drope v. Missouri, 420 U.S. 162 (1975), is consistent with Robinson. In Drope, the Supreme Court explained:

> The import of our decision in Pate v. Robinson is that evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required, but that even one of these factors standing alone may, in some circumstances, be sufficient. There are, of course, no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed; the question is often a difficult

one in which a wide range of manifestations and subtle nuances are implicated. That they are difficult to evaluate is suggested by the varying opinions trained psychiatrists can entertain on the same facts.

Id. at 180 (emphasis added).

Likewise, this court examined the state record in Coleman v. Saffle, 912 F.2d 1217 (10th Cir.), cert. denied, 111 S. Ct. 22 (1990) (per curiam), before it determined that the petitioner was not wrongly denied a competency hearing.[4]

> Petitioner further argues that he was deprived of a constitutionally adequate determination of competency because (1) the state trial court did not sua sponte conduct an evidentiary hearing on petitioner's competency to stand trial, and (2) the court failed to make an independent judicial determination of petitioner's competency to stand trial. We must disagree.
>
> The parties do not disagree concerning the underlying due process right not to be tried while incompetent, or the legal standard for determining competency to stand trial. The question presented is whether, in light of the information available to the trial court, "the [court's] failure to make further inquiry into petitioner's competence to stand trial

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[4] No meaningful distinction can be made, nor is made, in the text of § 2254(c), between the appropriate scope of review in those cases addressing a trial court's determination of competency and those addressing a determination of entitlement to a hearing on competency. The well-settled and logical requirement that we examine the whole record to determine if the state court erred is applicable in either situation.

denied him a fair trial." Drope v. Missouri, 420 U.S. 162, 174-75 (1975).

...

We have carefully reviewed the record, and conclude that there was insufficient evidence before the trial judge to mandate an evidentiary hearing on petitioner's competency to stand trial.

Id. at 1223-25 (footnotes omitted & emphasis added).

In addition, in Hemsi, 901 F.2d at 295-96, a case cited by the majority, the court wrote:

> The [competency] inquiry involves an assessment of whether the accused can assist "in such ways as providing accounts of the facts, names of witnesses, etc." United States v. Mercado, 469 F.2d 1148, 1152 (2d Cir. 1972). But it is not sufficient merely that the defendant can make a recitation of the charges or the names of witnesses, for proper assistance in the defense requires an understanding that is "rational as well as factual." Dusky v. United States, 362 U.S. at 402. In making its assessment, the court may take account of a number of factors, including the defendant's comportment in the courtroom. See, e.g., Drope v. Missouri, 420 U.S. 162, 180 (1975)....

Id. at 295 (emphasis added).

The law is clear. The Utah court's competency determination is entitled to a presumption of correctness, and upon review, support for that determination may be found in the record as a whole.

III. SUPPORT OF RECORD

Although some of the facts in the record -- including Defendant's suicide attempt, the last diagnosis of his doctors

and the abbreviated record review by the Prosecution's doctor -- disturb me as they do the majority, two principles regarding competency determinations are well-settled. First, "[n]ot all people who have a mental problem are rendered by it legally incompetent." Bouchillon, 907 F.2d at 593. And second, "[t]he court is free to disregard the testimony of expert witnesses (such as psychologists) as to the competency in favor of that of lay persons if there is sufficient evidence to justify doing so." Id. at 594 n.15; see also Maggio, 462 U.S. at 117-18 (court of appeals, when reviewing a competency determination, erroneously substituted its judgment as to witness credibility for that of the state court). The majority appears to have disregarded these principles.

The evidence in this case, as revealed by the trial record and supported by the observations of the judge, attorneys and prosecution psychologist firmly supports the trial court's determination that Mr. Lafferty had a rational understanding of the legal proceedings which were affecting him. A thorough review is in order.

Mr. Lafferty's competency to stand trial became an issue almost immediately after his arrest. The matter was raised because Mr. Lafferty and his brother refused appointment of counsel, and because their behavior during arraignment hinted they would claim the State could not try them because their actions were directed by God.[5] In any event, the State filed

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[5] The following exchanges occurred between the court and Defendant Ron Lafferty:

> THE COURT: ... This is a temporal court, it's structured along the lines where people deal with people's problems, and as to where truth comes down in that setting, that's the way the system is, to have the truth come out. But it's from people -- from so-called witnesses and others who have some association with or knowledge of the facts that are important.

a petition for inquiry into the Laffertys' competence, beginning a course of events that resulted in numerous examinations and reports by expert psychologists and psychiatrists, as well as discussions between the Laffertys, their attorneys and the trial judge.[6]

MR. RON LAFFERTY: So this court is not prepared to deal with matters pertaining to religion and that sort of thing; is that what you are saying?

THE COURT: Well --.

MR. RON LAFFERTY: Or spiritual matters?

THE COURT: Well, this is not a spiritual court. This is a temporal court.

MR. RON LAFFERTY: I needed to know that.

....

THE COURT: I'll proceed with you, Ronald Lafferty, to the information and the five counts therefore that has just been presented. Are you prepared at this time to enter a plea? Six counts, excuse me.

MR. RON LAFFERTY: I guess I'm not, your honor, because of the statement that you made because of the religious overtones and spiritual overtones in this matter. You just mentioned that this court doesn't deal with that sort of thing so it seems to me that you -- perhaps you don't have jurisdiction here. As a result, I'm not prepared to enter a plea because I don't want to give up my right to challenge the jurisdiction of this court, sir.

THE COURT: The court will then enter a plea of not guilty on your behalf.

[6] Competency examinations of criminal defendants are governed by Utah Code Ann. § 77-15-1 et seq. (Repl. Vol. 1990). The first Petition for Inquiry into Competency was filed on Sept. 27, 1984.

The two physicians who examined Defendant in October 1984 generally believed he was incompetent.[7] One of the doctors limited his conclusion, writing only that Defendant "may not be competent to proceed with the court processes because of his mental illness." Oct. Washburn Letter. Both interviewed him and found him cooperative, although one noted he refused to take any written psychiatric tests. Oct. Washburn Letter. Dr. Groesbeck reported Defendant was well aware of being charged with murder but refused to accept appointed counsel because he felt all lawyers are corrupt. He said Defendant could very quickly and easily outline the functions of the judge, attorneys, defendant and jury, and noted he was fully oriented to time, place and person. In addition, Defendant knew he faced the death penalty and insightfully avoided discussing anything incriminating. Oct. Groesbeck Letter at 3-7. "His intellectual level appeared to [be] average or above," according to Dr. Groesbeck. Id. at 7.

Nevertheless, both doctors thought Defendant was incompetent due to mental illness. They wrote he suffered from "grandiosity" and was afflicted with a paranoid personality system or disorder. Oct. Groesbeck Letter at 8-9; Oct. Washburn Letter. For example, Defendant described his claim of divine revelations to Dr. Groesbeck as a "flow of intelligence in the mind" that is "sweet" and "expanding." Oct. Groesbeck Letter at 5. The doctors firmly felt he could not effectively represent himself and questioned his ability to assist any attorney appointed for him. Dr. Groesbeck wrote that even though Defendant comprehended the nature of the

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[7] Letter from C. Jess Groesbeck, M.D. to Judge J. Robert Bullock (Oct. 9, 1984) (hereinafter Oct. Groesbeck Letter); Letter from Philip Washburn, M.D. to Judge J. Robert Bullock (Oct. 10, 1984) (hereinafter Oct. Washburn Letter).

proceedings, he did not realize how serious things were. Id. at 9.

Later, at a hearing, Defendant and his brother attacked the doctor's conclusions, arguing they were competent and capable of representing themselves at trial. Defendant maintained the main reason for refusing appointed counsel was "because we feel that we have our own best interests at heart." He felt he was competent for the same reason and also took issue with the paranoid personality disorder diagnosis that was made, according to him, on the basis of his divine revelations:

> And this delusion system or the problems that he [Dr. Washburn] mentioned here, I don't understand these long words here, he relates that to the fact that we claim to have received direct revelation from God, which of course we do claim; but we have been taught since we were knee-high-to-a-grasshopper that that was what we were supposed to do in the church that we were in. So that shouldn't be such a shock to an individual, and especially when the individual is a member of that same church.

The Laffertys, acting as their own counsel, then proceeded to call and question various witnesses who knew or were acquainted with the Laffertys. Some testified the Laffertys were competent, while others expressed doubt. None of the witnesses were experts, except for Dr. Washburn who stood by his letter to the trial judge.

During the two day hearing the court painstakingly explained how foolish it was for the brothers to represent themselves.[8] During this time the court saw how the

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[8] Defendant was ultimately represented at trial by counsel because at his final competency hearing he would not state for the record that he wished to represent himself.

Laffertys behaved through its discussions with them and it further observed them deal with witnesses. In the end, the court ruled they were competent. It said if either of them suffered from mental illness, a preponderance, or clear preponderance of the evidence did not reveal they were so impaired they could not comprehend the nature of the proceedings or punishment they faced. See, e.g., Utah Code Ann. § 77-15-2 (Repl. Vol. 1990).

Defendant's next mental health exam came only a month later, and it followed his attack on a guard. The guard requested the exam because Defendant seemed "physically out of control and did not appear to be mentally in control of his faculties" at the time of the attack. A team of doctors from Utah State Hospital, including one clinical and forensic psychologist and three physicians, examined Defendant for twenty-two days. Dr. Groesbeck, who examined Defendant in October and thought him incompetent then, was a member of the November team. This time, all four doctors, including Dr. Groesbeck, found Defendant competent.[9]

The November exam, which was much more thorough, disaffirmed October's results and concluded that Defendant was competent. During the exam, Defendant's "limited willingness to participate in formal psychological testing" was noted. Nov. Letter. Defendant's paranoid traits were also recognized, along with his "fundamentalist religious beliefs and a fervent interest in a strict interpretation of constitutional law." Id. Defendant was persuaded to take two psychological tests, including an I.Q. test and the Rorschach Inkblot test. The I.Q. test showed an above-average intellectual ability, while no evidence of formal thought disorder was suggested by the Rorschach. R. Howell, Ph.D.,

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[9] Letter from Drs. Austin, Howell, Heinbecker & Groesbeck to Judge J. Robert Bullock (Nov. 27, 1984) (hereinafter Nov. Letter).

Psychological Assessment (Nov. 29, 1984) at 3. Some history compiled during the November exam revealed the possibility Defendant once suffered from a "bipolar affective disorder" but there were no signs or symptoms of it during the exam nor had there been for several years.[10] Nov. Letter. The court, on the basis of the reports, again found Defendant competent for trial.

The state of affairs shifted drastically when Defendant attempted suicide by hanging on Saturday, December 19th 1984. This incident prompted another mental health examination as to his competency to stand trial was ordered. In the week before the suicide Defendant was agitated, having just had his trial date set. Apparently in response to the setting, he claimed to be possessed by an evil spirit and attacked his brother at the jail. R. Verville, Psychiatric Evaluation (Jan. 21, 1985) at 2. As for his mental health immediately after the suicide attempt, the Utah State Hospital team concluded after twenty days of evaluation that Defendant was incompetent and exhibited numerous signs of diffuse organic brain damage.[11] Individual reports noted a range of problems. For example, Defendant had great trouble dressing and could not remember his age, the date or current events. On various psychological tests, which he willingly took, he scored in the brain damaged category. His I.Q. results were twenty points lower than the results from October 1984.

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[10] A bipolar affective disorder is more commonly known as manic/depressive behavior. See generally American Psychiatric Association: Diagnostic and Statistical Manual of Mental Disorders 213, 225 (3d ed. rev. 1987) (setting forth diagnostic criteria for mood disorders and bipolar disorders).

[11] Letter from Drs. Heinbecker, Austin, Howell & Groesbeck to Judge J. Robert Bullock (Jan. 22, 1985) (hereinafter Jan. Letter).

Although the mental health effects from the suicide attempt were initially severe, they eventually began to resolve. About a month after the attempt Defendant again knew he was charged with murder. He generally remembered what happened and told one doctor his personal problems were caused by others. He named Chloe Low as a person who intruded in "family affairs" and said "this wouldn't have happened if Chloe Low had minded her business." P. Heinbecker, M.D., Psychiatric Evaluation, (Jan. 21, 1985). This view of Chloe Low was, of course, consistent with statements previously made to Ms. Low by Defendant.

Later, at a competency hearing on January 28, 1985, Defendant knew the charges he faced and believed he could discuss events surrounding the homicides if he wished. He was, however, weak and had lingering memory problems. He could not, for instance, remember anything about the suicide attempt itself. On questioning from the judge, Defendant testified his memory was coming back everyday. Nevertheless, the judge concluded in the end that Defendant was not yet competent to stand trial, although his overall condition was improving, and suggested he soon would be competent. In his review of Judge Bullock's ruling at this point in the case, the Magistrate observed "Judge Bullock was obviously taking a concerned, conservative approach." The competency proceedings overall also convinced the Magistrate that the state had a "deep and intense consideration" of the Defendant's condition. After independently examining the record, we agree with both of these observations.

The final competency hearing on April 2, 1985, was literally a battle of the experts. On one side, doctors from Utah State Hospital concluded that Defendant's mental health had deteriorated into a religious delusional system containing strong elements of paranoia and an inability to "determine the

boundaries between himself and good and evil spirits."[12] On the opposing side, a Prosecution expert testified Defendant was competent.

The state hospital doctors believed Defendant factually knew he was charged with murder and would be tried in a courtroom before a judge and jury. March Letter at 2. They did not, however, think he possessed a rational understanding of his situation. Id. And they attributed this lack of rationality to a personality change caused by oxygen deprivation to the brain during the attempted suicide. As a result, the doctors said Defendant's religious beliefs were now so delusional they "interfere[d] with his ability to meaningfully function, either independently in a courtroom or with the aid of counsel in a courtroom." They further noted defendant was again uncooperative when it came to taking psychological tests which could more specifically identify his mental state. Finally, signs of Defendant's lingering problems included one focal seizure involving his left hand and arm, and a doctor's note that Defendant was having trouble playing pool. Defendant seemed to forget which ball was the cue ball, and whether he was supposed to his the striped or colored balls. R. Howell, Ph.D., Psychological Addendum (March 22, 1985). Their bottom line mental health diagnosis stated Defendant suffered from amnesia and paranoia. March letter at 2.

The Prosecution's doctor viewed the paranoid diagnosis as nothing but a "straw dog." For him, the existence of a paranoid delusional system was not relevant to whether Defendant "can assist counsel and understand the proceedings in this court, and understand the punishment." After framing the issue this way and studying Defendant's medical records

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[12] Letters from Drs. Austin, Howell, Heinbecker & Groesbeck to Judge J. Robert Bullock (March 19, 1985) (hereinafter March Letter).

for four hours,[13] he found Defendant competent. In support of his position he offered a generally functional view of rationality centering on whether a person can piece things together, see relationships between incidents, remember information, and thereby factually and theoretically assist in his defense. The Prosecution's doctor maintained a paranoid delusional system by itself does not mean incompetency to stand trial. See maj. op. at 14-15.

After listening to both sides, the state trial court came down on the Prosecution's side and ruled Defendant competent to stand trial. Utah v. Lafferty, No. 9303, memorandum decision at 12 (Apr. 8, 1985). Specifically, the court found that even though Defendant suffered from mental illness, his condition was not so severe that it prevented him from comprehending the nature of the proceedings or the punishment he faced. Id. at 6. The court's findings in support of its position were detailed:

> [Defendant] has mental capacity to appreciate his presence in relation to time, place and things; his elementary mental processes are such that he knows and understands that he is in a court of justice and is charged with criminal offenses of two counts of criminal homicide, two counts of aggravated burglary, and two counts of conspiracy to commit murder; he knows and understands the penalties prescribed and he knows and understands that he could be given the death penalty although he may not believe it will occur, he understands that there will be a trial, that there will be a judge on the bench, a prosecutor present who will try to convict

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[13] The question of whether the opinion of a psychiatrist was given after sufficient examination goes to the weight of the evidence and thus is a question for the trier of fact.

him of criminal charges; knows and understands that he has a lawyer appointed for him who will undertake to defend him against those charges; he knows he will be expected, if he so chooses, to tell his lawyer the circumstances, to the best of his ability, of the facts surrounding him at the time and place where the law violations are alleged to have occurred; he knows that there will be a jury present to pass upon the evidence adduced as to his guilt or innocence of such charges; that he has sufficient mamory [sic] of material events that with the aid of memory reconstruction techniques he can relate these things in his own personal manner if he chooses to do so.

Id. at 6-7.

Turning to the paranoid diagnosis, the court conceded Defendant may be paranoid. But it was not persuaded the evidence -- including the suicide attempt -- meant Defendant was too paranoid or irrational for trial. The trial court wrote:

> Although the defendant may be operating within a paranoid delusional system, there is no evidence, except a suicide attempt, of irrational behavior within that system or within the system of his religious beliefs. In fact, his refusal to cooperate, assist counsel or admit that he is amenable to the laws of the State of Utah are all consistent with his paranoia and any delusional system pertaining to religion.

Id. at 7.

This factual recount, as evidenced by the record, illustrates the basis upon which the trial court could and did fairly find Mr. Lafferty competent. Despite Mr. Lafferty's contention that his behavior at hearings after the suicide

attempt demonstrates incompetence,[14] the record makes clear that Defendant's uncooperativeness was present both before and after the attempt. Therefore, his uncooperativeness cannot be attributed to any appreciable personality change appearing after the suicide attempt. The Defendant's own Utah State Hospital doctors admit in their final evaluation that "his personality structure and his demeanor have come to approximate his condition prior to [the] December 29[th]" suicide attempt. March Letter at 1.

The record is filled with instances where the Defendant was factually tuned in to the proceedings and rationally participating. The same trial judge observed Defendant in both the competency hearings and trial, and commented during the trial on Defendant's behavior. He noted, for example, that during the trial Defendant consulted with his attorney "quite frequently at the counsel table." His personal observations left him "more convinced now that I was ... that he's competent to proceed; or, to put it another way, that he's not incompetent to proceed." At the conclusion of the trial, the judge reaffirmed his views:

> 1. During a full and complete trial of the matter, from April 25, 1985 to May 7, 1985, a period of twelve days, which included approximately nine trial days, for the jury selection process, the trial and the penalty phase; the Court observed nothing in the words or conduct of the defendant, throughout the trial, which in any way showed or tended to show that he:
>
> (a) [W]as unable to comprehend the nature of the proceedings;

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[14] At the final competency hearing, Mr. Lafferty was asked if he wanted to represent himself at trial. He responded to all inquiries by taking the Fifth Amendment and refusing to answer.

(b) Was unable to understand the punishment specified for the offenses charges; or

(c) Was unable to assist counsel in his defense.

2. The Court wants to also make it clear that, as to the previous finding by the Court that the defendant was not incompetent to proceed, that should in no way be construed as merely a factual finding. Under any definition of the word "rational," which the Court in Dusky v. Unites States [sic] could have intended, this Court believes, from all of the evidence, including the Court's observation on nine trial days and also on numerous other times, at numerous other times prior to that trial, believes that the defendant's:

(a) Understanding of the proceedings, in his understanding of the punishment which could be imposed, that is the nature of the proceedings, the punishment that could be imposed; and his ability to consult with his lawyer, with a reasonable degree of rational understanding, are believed and held to be rational as well as factual understandings.

The Prosecuting attorney also noted how Defendant conversed with his lawyer. Moreover, at one point during the trial, Defendant's attorney reported to the court that Defendant:

> indicated in direct answer to my inquiry that there is nothing that he wants presented that I am not going to present. And, secondly, that there is nothing that I have done now that he takes exception to or thinks it was inappropriate or was not done. In fact, he has been complementary [sic] until now, and complimentary a few minutes ago. So, as of this time I think that what I'm doing is in accordance with either his clear desire or certainly him agreeing that my judgment is probably best.

Lastly, the record shows Defendant assisted in his defense and, at one point, even ordered his attorney to stop pursuing testimony from his doctors. If admitted, Defendant 's attorney could have used the testimony to argue Defendant was guilty of manslaughter, but not murder. Defendant, however, rejected this because he viewed this tactic as admitting guilt for a lesser charge. This action indicates Defendant obviously knew what was happening at trial, and it further shows his memory was clear because he recalled the specific information his attorney was pursuing from the doctors before he heard it again at trial.

IV. CONCLUSION

The majority is unable to point to any evidence which shows Mr. Lafferty was not accurately perceiving reality as it related to the murder charges and courtroom proceedings. Rather, it relies solely upon the testimony at the last competency hearing and upon Mr. Lafferty's refusal to present an insanity defense as evidence of incompetence. From this fragment of the record, the majority concludes Mr. Lafferty was a person suffering from mental illness to such a degree that he was unable to make decisions on the basis of a realistic evaluation of his own best interests. Maj. op. at 4, 18, 21. In reaching this conclusion, the majority substitutes its judgment of what is "realistic" and "best" for Mr. Lafferty. By taking issue with the subjective wisdom of Mr. Lafferty's decisions concerning how he wanted his case handled, the majority in effect chills constitutionally protected individual decision-making.[15]

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[15] I doubt whether the court would be so quick to hold an individual incompetent to stand trial who refused to raise an insanity defense because of unorthodox political beliefs. For example, tax protesters and other political protesters are often in court expressing

We review the record only to ensure that a permissible decision was made in light of the evidence. We do not retry the case and we do not substitute our judgment for that of the state court. On the contrary, we must give the state court factual findings a presumption of correctness. "[W]e cannot reverse the District Court's ruling merely because the evidence arguably supports a different result and we might have ruled differently." Bouchillon, 907 F.2d at 594.

A trial, reduced to its essence, is the investigation and determination of one or more doubtful facts. In the case before us, the fact under inquiry is Mr. Lafferty's competence. The state trial court found Mr. Lafferty competent. The Utah Supreme Court found no error. The majority, under the guise of reviewing the legal standard applied by the Utah court, parsed the record and in effect made its own determination of competency believing the law permits only a review of the pretrial proceedings. When the evidence is evaluated under the correct standard there exists no doubt the state court's finding of competency is fully and fairly supported by the record.

Properly and carefully reviewing the record as a whole, and giving proper deference to the trial court's findings under the Dusky standard, I cannot in good faith conclude that the Utah court's competency determination is not fairly supported by the record. I would affirm Mr. Lafferty's conviction.

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their extreme and inaccurate beliefs about the Constitution in bizarre ways. See, e.g., Lonsdale v. United States, 919 F.2d 1440 (10th Cir. 1990). Although these individuals are wrong and may make decisions contrary to their best legal interest, they are not necessarily incompetent. Like Mr. Lafferty, they may possess a factual understanding of court proceedings and can, if they choose, consult with a lawyer with a reasonable degree of rational understanding. When one is judged incompetent for rejecting his attorney's advice we will then have truly established the elitism of the bench and bar.

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF UTAH

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STATE of Utah,	)	
	)	
Plaintiff and Appellee,	)	Case No. 20740
	)	
v.	)	January 11, 1988
	)	
Ronald Watson LAFFERTY,	)	Rehearing Denied,
	)	February 18, 1988
Defendant and Appellant.	)	

Fourth District, Utah County
The Honorable J. Robert Bullock

Attorneys: Richard B. Johnson and Michael D. Esplin, Provo, for defendant and appellant.
David L. Wilkinson and Sandra L. Sjogren, Salt Lake City, for plaintiff and respondent.

ZIMMERMAN, Justice:

Defendant Ronald Watson Lafferty appeals from two convictions of first degree murder, two convictions of aggravated burglary, and two convictions of conspiracy to commit murder. On the two convictions of first degree murder, the jury imposed the death penalty. On appeal, Lafferty raises numerous claims of error and argues that his

convictions and sentences must be reversed. We affirm all convictions and all sentences which are the subject of this appeal.

Ron Lafferty believed that Brenda Lafferty, the wife of his brother Allen, had encouraged and assisted Ron's ex-wife in obtaining a divorce from him. After his divorce, Ron, who had previously been excommunicated from the Mormon church, began claiming that he had received a divine revelation that four individuals, including Brenda and her infant daughter, Erica, were to be "removed." On July 24, 1984, Ron and his brother, Dan Lafferty, made numerous comments to two companions that "the Lord" wanted Brenda and her child to die. On the same day, Ron and Dan forced their way into Brenda's house while Allen was away. Ron beat Brenda, strangled her with a vacuum cord, and slit her throat with a knife. Dan killed fifteen-month-old Erica by slitting her throat. Ron, Dan, and their companions subsequently broke into Chloe Low's house, intending to murder her, but Low was not at home. They also discussed the murder of Richard Stowe, the local Mormon leader who had excommunicated Ron, but abandoned that plan when they passed the turnoff to his residence. Ron and Dan Lafferty were later apprehended and tried separately. Dan, who was tried first, was convicted of capital murder among other charges and received two life sentences. Ron's trial was delayed, in part because of concerns that he might be incompetent to stand trial and in part because of his suicide attempt and violent behavior in jail. When he was tried, Ron was convicted of murder for the deaths of his sister-in-law and niece and of conspiring to murder Chloe Low and Richard Stowe in addition to other charges. He was sentenced to death. Further facts are set forth below.

On appeal, Lafferty raises a number of issues, including claims that the trial court erred by forcing him to stand trial while incompetent, denying him his right of self-representation, disallowing evidence of his insanity, allowing biased jurors to decide the case, allowing prejudicial remarks by the prosecutor, admitting gruesome photographs, and admitting evidence of his violent behavior in jail while awaiting trial.

The first claim is that Ron Lafferty was not competent to stand trial, Utah law prohibits the trial of a person who is incompetent. Utah Code Ann. § 77-15-1 (1982). On September 27, 1984, the prosecuting attorney filed a petition to determine Ron Lafferty's competence to stand trial. At a hearing held on October 23, 1984, the trial court heard testimony from several witnesses, observed Lafferty's conduct, considered the reports of two experts who had examined Lafferty, and found him competent to proceed.

Within a few days, the Utah County Sheriff filed a petition to redetermine competency because Lafferty had assaulted several people in jail. Lafferty was ordered to the Utah State Hospital for evaluation. During the period between November 5 and November 27, 1984, four court-appointed examiners evaluated Lafferty's condition and unanimously concluded that he did not suffer from a mental disease or defect, that he could comprehend the nature of the proceedings, and that he could assist counsel in his defense. At an in-camera proceeding held on November 30, 1984, the court again found Lafferty competent to proceed.

On December 29, 1984, Lafferty attempted to hang himself, but was resuscitated after being found unconscious and without a heartbeat. Because of the possibility of organic brain damage, the four examiners who had made the second evaluation conducted a third. On January 28,

1985, after hearing the testimony of Lafferty and the examiners, the trial judge found that Lafferty was incompetent to stand trial at that time. The trial judge stated, however, that the evidence showed great improvement in Lafferty's condition since the attempted hanging, improvement that would probably continue until Lafferty would be competent to stand trial. The trial judge ordered continued hospitalization and treatment.

On March 19, 1985, the four examiners released a follow-up report on Lafferty's progress. They stated that the organic problems caused by the suicide attempt had been partially resolved and that Lafferty's personality structure and demeanor had come to approximate his condition prior to the suicide attempt. The examiners found that Lafferty had a factual understanding of both the nature of the proceedings and the potential punishment for the offenses charged. Although the organic problems resulting from the suicide attempt had abated to such an extent that they no longer rendered Lafferty incompetent, the examiners believed that he was suffering from paranoia and was therefore incompetent.[1]

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[1] At a competency hearing held on April 2, 1985, the examiners testified that Lafferty was suffering from two mental illnesses: (i) an amnestic syndrome resulting from the suicide attempt and (ii) paranoia. However, the examiners made it clear that the amnestic syndrome did not render Lafferty incompetent to stand trial. In his testimony at the competency hearing, Dr. Howell stated: "I don't think his amnesia--I don't think his organic problem interferes with his helping [his attorney], I think it's his paranoid problem that interferes with that." Similarly, during the direct examination of Dr. Groesbeck, the following interchange occurred:

> Q Now, if he could put aside this religious belief or this paranoid delusional system, he could in fact cooperate with counsel and could in fact actively participate in the trial process, couldn't he?

In describing the symptoms of the paranoid disorder, the examiners stated that Lafferty's pervasive religiosity, which had been noted during the November, 1984 evaluation, had since developed into a "religious delusional system" that Lafferty was unable to determine the boundaries between himself and spiritual beings, that he was experiencing "blurred ego boundaries," that he was suffering from a "religious martyr complex," that his mind had created a "paranoid pseudo-community involving the legal and social systems," that one of Lafferty's revelations was "reflective of Messianic grandiosity," that Lafferty felt the hospital and the judicial system were agents of corrupt man-made law and were on trial before God, and that it was "impossible for him to [understand] the inconsistency of his objecting to others infringing on his liberty [while he claimed] an entitlement from God to infringe on the liberty of others."

The trial court held a competency hearing on April 2, 1985. Three of the four examiners who submitted the report testified at the hearing. Lafferty was questioned, and the State called an expert witness who differed with the four examiners in that he found Lafferty competent. On April 8, 1985, the trial court issued a memorandum opinion finding Lafferty competent to stand trial.

On appeal, Lafferty asserts that all of the reliable evidence supported a finding of incompetence and, therefore, that the trial court's contrary finding was factually erroneous. In essence, Lafferty argues that the court arbitrarily rejected the analyses and conclusions of the four court-appointed examiners who had observed him

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A Yes, if the delusional system were put aside, then I think he could, even in spite of the fact that he does have some memory deficits in the organic side of his problem.

over a long period of time in favor of the opinion of one state expert who had relatively brief exposure to the matter. We reject this claim.

In a competency proceeding, a trial court must determine whether an accused has the ability to understand the nature of the proceedings and the potential punishment and has the ability to assist counsel in his or her defense. Utah Code Ann. § 77-15-2 (1982).[2] Such a determination is ultimately a mixed question of fact and law. *Drope v. Missouri*, 420 U.S. 162, 174-75 n. 10, 95 S.Ct. 896, 905 n. 10, 43 L.Ed.2d 103 (1974); *Pate v. Robinson*, 383 U.S. 375, 385-86, 86 S.Ct. 836, 842, 15 L.Ed.2d 815 (1966); *White v. Estelle*, 459 U.S. 1118, 1121-23, 1125-26, 103 S.Ct. 757, 758-60, 74 L.Ed.2d 973 (1983) (Marshall, J., dissenting). The legal part of the question is the proper interpretation of the statutory standard. Of course, any such interpretation must adequately protect the due process rights of an accused. *See Drope*, 420 U.S. at 163, 171-72, 174-75, 95 S.Ct. at 899, 903-04, 905; *Pate*, 383 U.S. at 378, 86 S.Ct. at 838; *White*, 459 U.S. at 1121, 103 S.Ct. at 758 (Marshall, J., dissenting).

Lafferty expressly challenges the trial court's findings of fact. He does not expressly claim that the trial court violated his right to due process under either the federal or

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[2] Section 77-15-2 reads:

> For the purposes of this chapter, a person is incompetent to proceed if he is suffering from a mental disease or defect resulting either:
>
> (1) In his inability to comprehend the nature of the proceedings against him or the punishment specified for the offense charged;
>
> or
>
> (2) In his inability to assist his counsel in his defense.

Utah Code Ann. § 77-15-2 (1982).

the state constitution by misinterpreting the statute. However, he does make an apparent attack on the trial court's statutory interpretation by pointing out that he did not cooperate fully with his counsel at trial. Therefore, we reach the federal due process issue despite Lafferty's failure to clearly raise it. We do not reach the parallel state constitutional issue because Lafferty has not briefed it. *See infra* note 5.

As we read section 77-15-2, the relevant inquiry is whether Lafferty had the *ability* to assist counsel, not whether he in fact chose to assist counsel or to comply with all of counsel's wishes. This reading of the statute complies with federal due process standards. *See Drope*, 420 U.S. at 172, 95 S.Ct. at 904; *Pate*, 383 U.S. at 388, 390-91 & n. 4, 86 S.Ct. at 843, 844-45 & n. 4 (Harlan, J., dissenting); *Dusky v. United States*, 362 U.S. 402, 402, 80 S.Ct. 788, 788, 4 L.Ed.2d 824 (1960) (per curiam). The trial court applied the statute as we have interpreted it. It specifically found that Lafferty had the ability to assist his counsel and that his mental condition was such that his due process rights would not be denied by proceeding to trial. We conclude that Lafferty's due process rights under the federal constitution were not violated by the application of section 77-15-2 as interpreted by the trial court.

Lafferty has directly challenged the trial court's factual findings under the statute. Findings of fact will not be overturned unless clearly erroneous. Utah R.Civ.P. 52(a). The clearly erroneous standard established by Utah Rule of Civil Procedure 52(a) applies to competency proceedings because they are civil rather than criminal in nature. *See Society of Professional Journalists v. Bullock*, 743 P.2d 1166, 1177 n. 13 (Utah 1987). In addition, rule 52(a)'s clearly erroneous standard applies to judicial findings of fact in both civil and criminal proceedings. *State v.*

Walker, 743 P.2d 191, 192 (Utah 1987) (citing Utah R.Crim.P. 26(g); Utah R.Civ.P. 81(e)).

Our review of the record reveals the following: (i) the court-appointed examiners failed to explain and to support adequately the conclusory labels they affixed to Lafferty's mental state, thus making the affirmative evidence of incompetency weak; (ii) the examiners' diagnoses were based on the premise that Lafferty's religious beliefs and experiences did not accord with reality, an unsupportable premise on which the trial judge could not rely; and (iii) ample affirmative record evidence supports the trial judge's finding of competency. We therefore conclude that the trial court's rejection of the examiners' opinions and its conclusion that Lafferty was competent were not clearly erroneous.

The trial court's rejection of the examiners' conclusions is supported by the examiners' failure to explain the change in their opinion that occurred between November, 1984, and March, 1985.[3] For example, in November, Dr. Howell opined that Lafferty was competent, stating:

> Because in my opinion, Mr. Lafferty does not have a mental illness, he is therefore competent to proceed at least so far as his mental health is concerned. He may object to having a lawyer defend him, but I believe this decision will not be the result of the thinking of a mentally disordered person.

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[3] Although Lafferty did try to hang himself in December, 1984, neither the examiners' reports nor their testimony indicate that the suicide attempt and its consequences were the bases for their changed opinions.

Similarly, in a joint report dated November 27, 1984, all four experts found that Lafferty's religiosity was not a symptom of paranoia or other mental illness, stating:

> We find that Mr. Lafferty is not mentally ill. . . . Although he clearly has fundamentalist religious beliefs . . ., we feel that these do not approach the level of a thought disorder. He specifically does not meet the criteria for "paranoia" or paranoid schizophrenia.

Thus, in November, 1984, the experts did not consider Lafferty's religiosity a symptom of any mental illness.

In March, 1985, however, the doctors claimed that Lafferty's pervasive religiosity had become a "religious delusional system." Yet, the examiners' use of new diagnostic labels--such as "Messianic grandiosity" and "religious martyr complex"--did not necessarily indicate a change in Lafferty's religiosity or mental state since November. For example, Lafferty's reported revelations occurred before the November examination, and he did not purport to have received any revelations after that time. Nevertheless, in March the doctors stated that Lafferty's revelations reflected "Messianic grandiosity," one of the labels used to support their finding of incompetency to assist counsel. It is unclear what had changed since November, other than the labels used to describe Lafferty's condition.

Although the examiners were aware in November of the revelation instructing Ron Lafferty to kill Brenda and Erica Lafferty, they found him to be mentally sound at that time. However, their conclusion in March that he was mentally ill was based in part on his inability to understand the "inconsistency" of objecting to infringements of his freedom while claiming an entitlement from God to infringe on the rights of Brenda and Erica. Citing no

change whatsoever in the underlying facts, the examiners simply characterized the revelation differently in March than they had in November.

Between November and March, the examiners also changed the characterization of Ron Lafferty's suspicion of the legal system and his belief that God would defend him in the courtroom. In November, they concluded that his beliefs and suspicions were "the result of preoccupation with religion and not the result of mental illness." Yet, in March, they stated that he was suffering from a "religious martyr complex" and was experiencing a "paranoid pseudo-community involving the legal and social systems." The record does not indicate that these new labels reflect any actual change in Lafferty's condition. The mere recitation of new labels conveyed little of substance about the changes in Lafferty's condition that supposedly led the experts to change their views.

Certainly, expert psychological testimony can be useful in competency proceedings. However, its utility depends on its intelligibility and persuasiveness. In *Carter v. United States*, 252 F.2d 608, 617 (D.C.Cir. 1957), the court stated:

> Unexplained medical labels--schizophrenia, paranoia, psychosis, neurosis, psychopathy--are not enough. Description and explanation of the origin, development and manifestations of the alleged disease are the chief functions of the expert witness. The chief value of an expert's testimony in this field, as in all other fields, rests upon the material from which [the] opinion is fashioned and the reasoning by which he [or she] progresses from [the] material to [the] conclusion; . . . it does not lie in [the] mere expression of conclusion.

Similarly, Chief Justice Warren E. Burger, then sitting on the United States Court of Appeals for the District of Columbia Circuit, aptly observed:

> The jury wants and needs help from the expert, but it does not help a jury of [laypersons] to be told of a diagnosis limited to the esoteric and swiftly changing vocabulary of psychiatry. Every technical description ought to be "translated" in terms of "what I mean by this," followed by a down-to-earth concrete explanation in terms which convey meaning to [laypersons]. A psychiatrist who gives a jury a diagnosis, for example, of "psycho-neurotic reaction, obsessive compulsive type" and fails to explain fully what this means, would contribute more to society if he [or she] were permitted to stay at his [or her] hospital post taking care of patients.

Campbell v. United States, 307 F.2d 597, 614 (D.C.Cir. 1962) (Burger, J., dissenting). Chief Justice Burger's reasoning applies with equal force to expert testimony on issues such as competency that are decided by a judge rather than a jury.

A finder of fact, whether judge or jury, is free to reject diagnoses and conclusions that are not adequately explained. Even in the unlikely event that a fact finder understands the full significance of a psychological term such as "paranoid pseudo-community," the mere incantation of the terms does not convey much of substance because it fails to describe the analysis and data on which the diagnosis was based. We do not mean to imply that the doctors' diagnoses in this case were necessarily incorrect. We simply hold that in the absence of an adequate explanation, the trial court could properly reject as

unpersuasive and unhelpful the conclusory labels the doctors assigned to Lafferty's condition.

The trial court could also reject the examiners' opinions because they were based on unfounded assumptions about Lafferty's religious experiences. The examiners concluded that Lafferty was mentally ill because they assumed that his various religious experiences did not occur, regardless of the purported substance of those experiences.

The examiners' diagnoses illustrate the assumptions underlying their opinions. In reporting that Lafferty's revelations reflected "Messianic grandiosity," the doctors necessarily assumed that the revelations were not real, that they never happened. One doctor testified that he was simply unwilling to believe that Lafferty's faith in divine intervention was rational. The doctors also assumed the Lafferty's experience with spirits did not occur; they stated that his inability to "determine the boundaries between himself and . . . spirits" was a symptom of paranoia. Overall, the examiners concluded that Lafferty was living within a "religious delusional system"; in other words, the examiners thought that Lafferty's religious experiences did not comport with reality. In the absence of some foundation for their assumptions that Lafferty's religious experiences did not occur, the trial court was justified in rejecting the psychiatrists' conclusions.

Moreover, the trial court's rejection of the examiners' opinions was in accordance with federal constitutional authority. Just as lack of foundation prevents courts from deciding whether religious experiences actually occur, the religion clauses of the first amendment prohibit courts from

determining the validity of religious beliefs.[4] *See e.g., United States v. Ballard*, 322 U.S. 78, 86-87, 64 S.Ct. 882, 886, 88 L.Ed. 1148 (1944); *United States v. Lee*, 455 U.S. 252, 257, 102 S.Ct. 1051, 1055, 71 L.Ed.2d 127 (1982). In *United States v. Ballard*, the Court stated:

> Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they are beyond the ken of mortals does not mean that they can be made suspect before the law.

322 U.S. at 86-87, 64 S.Ct. at 866. Similarly, due process considerations bar courts from requiring defendants to prove the truth of their religious beliefs because they would have to prove the unproveable, an obvious unfairness of the most fundamental kind. *See* U.S. Const. amend. XIV; Utah Const. art I, § 7.

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[4] It might be argued that Lafferty's belief in divine revelations and spirits is so bizarre that it is not within the legitimate protections of the first amendment. *See Thomas v. Review Bd. of the Ind. Employment Sec. Div.*, 450 U.S. 707, 715-16, 101 S.Ct. 1425, 1430-31, 67 L.Ed.2d 624 (1981). However, we take judicial notice of the fact that belief in divine revelation and personal spiritual experiences are part of the doctrine of the Mormon religion, of which Lafferty had at one time been a member. *See, e.g. Doctrine and Covenants*, Official Declaration--2 (revelation to Mormon leader Spencer W. Kimball in 1978 extending priesthood to all worthy men, whereas formerly blacks had been excluded); *Doctrine and Covenants* § 89 (revelation to church founder Joseph Smith in 1833 prescribing a healthy lifestyle); *Book of Mormon* I Nephi 4:10-18 (revelation to Nephi, circa 600 B.C., commanding him to kill Laban); *cf.* Genesis 6:13-22 (God gave Noah instructions for building an ark); Genesis 22:1-2 (God instructed Abraham to slay his son Isaac as a sacrificial burnt offering); I Samuel 15:1-3 (God sent Saul to destroy the Amalekites).

The final reason for upholding the trial judge's determination that Lafferty was competent to stand trial is that the record contains sufficient evidence to support that conclusion. Lafferty contends that no reliable evidence supports a finding of competence, but we disagree. It is true that four experts testified that they considered Lafferty incompetent in the spring of 1985. And it is also true that the State's sole expert had minimal exposure to the facts before he gave his opinion that Lafferty was competent. But merely weighing the number of witnesses is never dispositive. *See Lemon v. Coates*, 735 P.2d 58, 60 (Utah 1987); *Yelderman v. Yelderman*, 669 P.2d 406, 408 (Utah 1983); *Holland v. Brown*, 15 Utah 2d 422, 425-26, 394 P.2d 77, 79 (1964); *United States v. Handy*, 454 F.2d 885, 888 (9th Cir. 1972).

The trial court heard and considered all the expert testimony, put it in perspective against the background of the prior hearings, and observed Lafferty before it made the following findings of fact:

> [Lafferty] has the mental capacity to appreciate his presence in relation to time, place and things; his elementary mental processes are such that he knows and understands that he is in a court of justice and is charged with criminal offenses of two counts of criminal homicide, two counts of aggravated burglary, and two counts of conspiracy to commit murder; he knows and understands the penalties prescribed and he knows and understands that he could be given the death penalty although he may not believe it will occur; he understands that there will be a trial, that there will be a judge on the bench, a prosecutor present who will try to convict him of criminal charges; knows and understands that he has a lawyer appointed for him

> who will undertake to defend him against those charges; he knows he will be expected, if he so chooses, to tell his lawyer the circumstances, to the best of his ability, of the facts surrounding him at the time and place where the law violations are alleged to have occurred; he knows that there will be a jury present to pass upon the evidence adduced as to his guilt or innocence of such charges; . . . he has sufficient memory of material events that with the aid of memory reconstruction techniques he can relate these things in his own personal manner if he chooses to do so.

The trial court also found that Lafferty generally acted consistently and rationally within his system of religious beliefs. On the basis of these factual findings, the trial court concluded that Lafferty had both the ability to comprehend the nature of the proceedings against him and the punishment specified for the offense charged and the ability to assist counsel in his defense.

Having reviewed the record evidence under the standard of review applicable to trial court findings of fact, we cannot say that the trial court's findings were clearly erroneous. *See* Utah R.Civ.P. 52(a).

Lafferty's second claim on appeal is that by not allowing him to defend himself, the trial court denied his right to self-representation guaranteed by the sixth amendment to the federal constitution and article I, section 12 of the Utah Constitution, as well as the codification of that right in section 77-32-2 of the Code. However, he does not argue that the analysis of this issue under the Utah Constitution would be different from its analysis under the federal constitution. Therefore, no state constitutional

analysis is necessary.[5] Similarly, no statutory analysis is necessary because section 77-32-2 is apparently nothing more than a codification of the constitutional rights to assistance of counsel and self-representation.[6] Moreover,

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[5] In several of his claims of error, Lafferty has relied nominally on state constitutional provisions while actually relying on the parallel federal constitutional provisions and analysis based on them. As a general rule, we will not engage in state constitutional analysis unless an argument for different analyses under the state and federal constitutions is briefed. *See State v. Ashe*, 745 P.2d 1255, 1257 n. 2 (Utah 1987); *State v. Earl*, 716 P.2d 803, 805-06 (Utah 1986); *cf. State v. Hygh*, 711 P.2d 264, 271-73 (Utah 1985) (Zimmerman, J., concurring) (arguments for different analyses under the state and federal constitutions should be considered if made). We have said:

> This Court will review errors raised and briefed on appeal in death penalty cases, even though no proper objection was made at trial, but will reverse a conviction based upon such errors only if they meet the manifest and prejudicial error standard. In addition, this Court has the power to notice manifest ("palpable") error apparent in the record and correct a conviction based upon the same if the error is prejudicial even though such error is not objected to at trial or assigned on appeal.

State v. Tillman, [750] P.2d [546], [553] (Utah 1987) 72 Utah Adv.Rep. 6, 7 (Dec. 22, 1987). As *Tillman* implies, the mere mention of a claim of error unaccompanied by any legal argument is not necessarily enough, even in a death case, to require that we engage in a full-blown analysis of the claim. Unless the error is manifest on the record, not only must it be raised, but an argument must be briefed. This Court will not engage in constructing arguments out of whole cloth on behalf of defendants in capital cases. That is not to suggest, however, that if the issues were properly presented, we might not find some variance between the state and federal rights.

[6] Section 77-32-2 provides:

> Counsel shall be assigned to represent each indigent person who is under arrest for or charged with a crime in which there is a substantial probability that the penalty to be imposed is confinement in either jail or prison if:

Lafferty does not argue that in enacting section 77-32-2, the legislature either intended to or in fact did enlarge the scope of those constitutional rights.

Lafferty grounds this claim factually on the trial court's finding that he was competent to stand trial. He contends that because he was competent, the trial court was obligated to honor his request that he be permitted to defend himself. The sixth amendment to the federal constitution guarantees an accused the right to self-representation. *See, e.g., McKaskle v. Wiggins,* 465 U.S. 168, 173-74, 104 S.Ct. 944, 948-49, 79 L.Ed.2d 122 (1984); *Faretta v. California,* 422 U.S. 806, 807, 818, 95 S.Ct. 2525, 2527, 2532, 45 L.Ed.2d 562 (1975). However, it also grants a countervailing right to the assistance of counsel. *See, e.g., Johnson v. Zerbst,* 304 U.S. 458, 462-63, 58 S.Ct. 1019, 1022, 82 L.Ed. 1461 (1938). "[A]n accused has a Sixth Amendment right to conduct his [or her] own defense, *provided only that he [or she] knowingly and intelligently forgoes his [or her] right to counsel...." McKaskle,* 465 U.S. at 173, 104 S.Ct. at 948 (emphasis added). A mere finding of competence, without more, does not automatically enable an accused to waive the constitutional right to assistance of counsel and to conduct his or her own defense. In order to assert the right of self-representation, and accused must not only be competent, but must also intelligently and knowingly waive the right to assistance of counsel:

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(1) The defendant requests it; or

(2) The court on its own motion or otherwise so orders and the defendant does not affirmatively waive or reject of record the opportunity to be represented.

Utah Code Ann. § 77-32-2 (Supp.1987).

> Although petitioner received a hearing on the issue of his competence to stand trial, there appears to have been no hearing or inquiry into the issue of his competence to waive his constitutional right to the assistance of counsel and proceed, as he did, to conduct his own defense. "The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused--whose life or liberty is at stake--is without counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused."

Westbrook v. Arizona, 384 U.S. 150, 150, 86 S.Ct. 1320, 1320, 16 L.Ed.2d 429 (1966) (quoting *Johnson*, 304 U.S. at 465, 58 S.Ct. at 1023); *see also State v. McCumber*, 622 P.2d 353, 356 (Utah 1980) (fundamental constitutional right to due process may be waived knowingly and voluntarily only).

When Lafferty first asserted his right to self-representation, he was allowed to conduct his own defense with the assistance of stand-by counsel, as is permissible under *McKaskle v. Wiggins*, 465 U.S. at 184, 104 S.Ct. at 954. After the suicide attempt, stand-by counsel conducted Lafferty's defense until he regained competence to stand trial. At a hearing on April 24, 1985, the trial judge informed Lafferty of his right to waive counsel and advised him of the court's responsibility to determine whether the waiver was knowing and intelligent. Lafferty's attorney asserted that Lafferty wished to represent himself, but when the trial court attempted to question Lafferty in this regard, Lafferty responded, "No comment." The trial court explained that a waiver of the right to assistance of counsel

must be affirmative and that Lafferty would have to answer some questions so that the trial court could determine whether Lafferty's waiver was knowing and intelligent. Lafferty's response to further questioning was again, "No comment." Because Lafferty failed to waive his right to counsel affirmatively and failed to give the trial court any basis for determining that his decision to represent himself was made "knowingly and intelligently," we hold that the trial court did not violate the federal constitution by requiring the defense attorney to continue to represent Lafferty.

Lafferty's third claim is that the trial court, after having appointed counsel to defend him, erred in allowing Lafferty to control substantive aspects of his defense. At trial, defense counsel proffered expert testimony concerning Lafferty's mental state at the time of the killings, in an attempt to establish a mental state for manslaughter rather than for first degree murder. Lafferty strongly objected to that approach; he explained to the trial court that he feared the jury would interpret it as an admission of guilt. The trial court informed Lafferty that an argument in the alternative is not an admission of guilt; that absent a manslaughter defense, the jury would probably be left with a choice between a verdict of not guilty and a verdict of first degree murder; that the jury could impose the death penalty for first degree murder; and that defense counsel felt strongly that this evidence was essential to Lafferty's defense. Both the trial court and defense counsel were careful to assure that Lafferty had a clear understanding of the situation and the consequences of his decision. Lafferty remained firm in his decision, based on the belief that the jury would interpret the introduction of evidence supporting a manslaughter defense as an admission of guilt. Observing that nothing indicated that Lafferty was

incompetent, the trial court ordered Lafferty's attorney to comply with his client's wishes. Lafferty argues that the court should not have allowed him to control his defense in this manner. Because he cites no applicable constitutional provisions or case authority, we assume that his claim is based solely on the federal constitutional right to assistance of counsel. *See supra* note 5. We disagree with Lafferty's contentions.

In *State v. Wood,* 648 P.2d 71, 91-92 (Utah), *cert. denied,* 459 U.S. 988, 103 S.Ct. 341, 74 L.Ed.2d 383 (1982), this Court held that the sixth amendment requires an attorney to present a defense of innocence if the client insists, even if it is against the better judgment of the attorney, because "an attorney acts as an assistant for [the] client, and not as a master." 648 P.2d at 91-92 (citing *Faretta v. California,* 422 U.S. at 820, 95 S.Ct. at 2533); *see* U.S. Const. amend.VI. The right to assistance of counsel "implies a right in the defendant to conduct his [or her] own defense, with *assistance* at what, after all, is his [or her], not counsel's[,] trial. . . . The [accused] must be allowed to control the organization and content of his [or her] own defense. . . ." *McKaskle v. Wiggins,* 465 U.S. at 174, 104 S.Ct. at 949. Clearly, the sixth amendment gives an accused the right to control the substance of his or her defense. An accused is not bound to follow the recommendations of counsel. This is true despite the fact that "self-representation is almost always likely to be detrimental to a defendant, no matter how intelligent or well-educated." *State v. Wood,* 648 P.2d at 92; *accord McKaskle v. Wiggins,* 465 U.S. at 177-78 n. 8, 104 S.Ct. at 950-51 n. 8.

Clearly, the right to control the substance of one's own defense presents the danger that an accused will make decisions that are seriously detrimental to his or her

interests. However, given the trial court's duty to protect an accused's right to counsel and to assure that the accused does not waive that right unknowingly or unintelligently, we think that this danger does not warrant a blanket rule that would free a competent accused from the consequences of his or her informed choices. In any event, the need for such a rule is obviated when, as in the present case, the trial court assures that a competent accused makes decisions with a basic understanding of the situation and the potential consequences. We find that the trial court did not abuse its discretion either by allowing Lafferty to rely solely on the defense of innocence or by blocking his attorney's attempts to present a manslaughter defense.

Lafferty's fourth claim is that the trial court strictly interpreted section 77-14-4(2) of the Code, violating his due process and equal protection rights under the state and federal constitutions. U.S. Const. amend. XIV; Utah Const. art. I, §§7, 24. He does not argue for a separate state constitutional analysis, and we consider only his federal claim. *See supra* note 5.

Section 77-14-4(2) provides that an accused who fails to cooperate fully with court-appointed examiners shall be barred from presenting at trial expert testimony going to the issue of insanity or diminished mental capacity. Utah Code Ann. § 77-14-4(2) (Supp.1987). Lafferty argues that a strict interpretation would allow a statutorily insane defendant to discard the insanity or diminished capacity defense simply because the defendant's paranoia prevents the required cooperation.

Whatever merit Lafferty's argument may have, *see, e.g., United States v. Byers,* 740 F.2d 1104, 1115 (D.C.Cir. 1984), the issue is not presented in this case for two reasons. First, at the competency hearing on April 8, 1985, the trial court determined that Lafferty was not statutorily

insane at that time. In a hearing held the next day, the trial court thoroughly explained the consequences of refusing to cooperate with court-appointed examiners. Lafferty said that he understood the consequences but would not cooperate. He made an informed decision at a time when he had been found competent. Therefore, he was not statutorily insane when he decided not to cooperate. Second, the trial court did not exclude expert testimony on the issue of Lafferty's insanity or diminished mental capacity pursuant to section 77-14-4(2). The only reason that such evidence was not introduced in the guilt phase of the trial was Lafferty's adamant refusal to present either the insanity or the manslaughter defense. Lafferty refused to present either of those defenses because he believed that the jury would interpret them as an admission of guilt. Because the statute did not come into play in Lafferty's decision not to present those defenses, he has no stake in the resolution of the statute's proper interpretation. Without a stake in the resolution of this issue, Lafferty lacks standing to assert the claim. *See, e.g., Society of Professional Journalist v. Bullock,* 743 P.2d at 1173, 1174; *Jenkins v. Swan,* 675 P.2d 1145, 1148-49 (Utah 1983).

[The remainder of Lafferty's claims did not involve the competency determinations and will not be reproduced here; they can be found in 749 P.2d at 1250-61.]

HALL, C.J., concurs.

HOWE, Justice (concurring):

I concur, except I desire to withhold my concurrence from any implication that defendant's belief that he had received divine revelation to kill four people could not be

relied upon by the examiners as a basis for their opinions as to his mental state. While I agree generally that religious beliefs and experiences may not be assumed to be unreal or inquired into by the courts, as stated in the majority opinion, it is unnecessary to the disposition of this case to rely on that rule when considering a religious belief as to divine direction to kill.

DURHAM, J., concurs in the concurring opinion of HOWE, J.

STEWARD, Associate Chief Justice (concurring in the result on the conviction and dissenting as to the penalty):

Although I concur in the convictions of the defendant, I do not concur in the majority opinion. Among other points of disagreement with that opinion, I disagree that the trial court's rejection of the examiners' opinions as to Lafferty's competence was in any way required by, or in accord with, the Constitution, as the majority opinion suggests, because "the religion clauses of the First Amendment prohibit courts from determining the validity of religious beliefs." Nor do I believe that the examiners reached their conclusions because they "assumed that Lafferty's religious experiences did not occur."

The trial court did not err, however, in holding that the defendant could assist counsel in the defense of the case. He clearly knew what the charges against him were, the possible penalties, and that defense counsel would be available to represent him. Although the defendant's memory of the events surrounding the homicide may have been less sharp after the suicide attempt, his memory of those events still existed in a degree sufficient to allow him to assist counsel.

[The balance of Justice Stewart's opinion deals with what he considered to be prejudicial error in the penalty phase of the trial and will not be reproduced here; it can be found in 749 P.2d at 1262-63.]

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RONALD WATSON LAFFERTY, Petitioner-Appellant,	)	
v.	)	No. 90-4010
GERALD COOK, Warden of the Utah State Prison, Respondent-Appellee.	)	

ORDER

Filed: January 3, 1991

Before McKAY, Chief Judge, HOLLOWAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY and EBEL, Circuit Judges.

The court has for consideration the petition for rehearing and suggestion for rehearing en banc filed by the respondent, Gerald Cook, Warden of the Utah State Prison.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision. Judge Brorby voted to grant rehearing.

Pursuant to Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing en banc was transmitted to the members of the panel and to all judges

of the court who are in regular active service. A poll was taken and the court was evenly divided on the question of rehearing en banc. Accordingly, the suggestion for rehearing en banc is denied. See Fed. R. App. P. 35(a). Circuit Judges Moore, Anderson, Tacha, Baldock, and Brorby voted to grant rehearing en banc.

Entered for the Court

/s/
ROBERT L. HOECKER, Clerk